

October 2015

Payment Systems, Consumer Tragedy, and Ineffective Remedies

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Recommended Citation

Marc L. Roark (2014) "Payment Systems, Consumer Tragedy, and Ineffective Remedies," *St. John's Law Review*: Vol. 88 : No. 1 , Article 4.

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PAYMENT SYSTEMS, CONSUMER TRAGEDY, AND INEFFECTIVE REMEDIES

MARC L. ROARK[†]

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INTRODUCTION

Over the last twenty years, American payments have significantly evolved.¹ In 1990, check payments made up the single largest category of American payments by far—then, check payments more than doubled either the total number of cash and credit or debit card transactions, and exceeded both types of transactions together.² In that time, several different evolutions in payments have occurred. The establishment of credit cards as mainstream access to payments rather than access reserved for those that had a special means of access—such as business travelers, club members, or those with superior financial means³—and the innovative introduction of peer-to-peer payment processing through third parties such as PayPal,⁴ are just a

¹ Ron Borzekowski et al., *Consumers' Use of Debit Cards: Patterns, Preferences, and Price Response*, 40 J. MONEY, CREDIT & BANKING 149, 149–50 (2008); Marc Rysman, *An Empirical Analysis of Payment Card Usage*, 55 J. INDUS. ECON. 1, 30, 34 (2007); Kenneth J. White, *Consumer Choice and Use of Bank Credit Cards: A Model and Cross-Section Results*, 2 J. CONSUMER RES. 10, 18 (1975).

² See SUSAN HERBST-MURPHY, *TRENDS AND PREFERENCES IN CONSUMER PAYMENTS: LESSONS FROM THE VISA PAYMENT PANEL STUDY 1* (2010) (indicating “increasing adoption over time of plastic and other electronic payment forms, while usage of cash and checks has declined”); see also THE NILSON REPORT, Issue 761, Apr. 2002; THE NILSON REPORT, Issue 823; Dec. 2004; THE NILSON REPORT, Issue 869, Dec. 2006.

³ See Matthew J. Bernthal et al., *Credit Cards as Lifestyle Facilitators*, 32 J. CONSUMER RES. 130, 138 (2005); HERBST-MURPHY, *supra* note 2, at 9–12 (analyzing the modern trends in payment methods, and noting that the preferences vary with such factors as age, gender, life stage, and income); Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 88 (2000).

⁴ Some technologies in that time have been tried and failed. See, e.g., Christopher R. Plouffe et al., *Why Smart Cards Have Failed: Looking to Consumer*

couple of innovations that have shaped consumer expectations for engaging in the marketplace over time. Americans in that time have become far more comfortable with non-traditional intermediaries—that is, non-banks—being involved with their financial transactions and have embraced payment mechanisms that, unlike their banking or credit-based counterparts, offer fewer protections against loss of value or the risk of company failure.⁵

In the last fifteen years, the emergence of stored money systems—also known as stored value products—by merchants for the purpose of deferred sales to consumers has both innovated and challenged the framework of American payments.⁶ The first stored money system in the United States was the Neiman Marcus Card, which allowed consumers to preload money on a plastic card to give away as a gift or use themselves in the future. Since the pre-paid card's emergence in the market in 1994, the basic transaction has remained unchanged. Consumers pay cash or use credit or debit cards to obtain credits with merchants who honor those credits for merchandise at a later date.⁷ Credits are maintained using an electronic recording inventory, maintained either by the merchant—a closed-loop system—or by a third party—an open-loop system.⁸ Now, stored value systems are far

and Merchant Reactions to a New Payment Technology, 18 INT'L J. BANK MARKETING 112, 112–13 (2000).

⁵ Daniel Hough et al., *World of Choice: Consumer Payment Preferences*, BAI BANKING STRATEGIES, Jan.–Feb. 2009, at 15 (“It’s not surprising that electronic payment . . . has outpaced paper. What is surprising is how quickly and aggressively consumers have embraced these forms of payment and how pervasive they have become.”).

⁶ *Building a Better Bank Card: Reaching the Unbanked with Stored Value Cards*, RFSI STRATEGY GUIDE 4.1, available at http://www.cfsinnovation.com/system/files/imported/managed_documents/bankcard.pdf (last visited Sept. 16, 2014).

⁷ Neiman Marcus was the first major retailer to introduce the marketplace to “stored value cards” in 1994 when it replaced paper gift certificates with prepaid cards. Steven Ritchie, *Will Regulators Burst the Prepaid Bubble?*, 9 N.C. BANKING INST. 201, 203 (2005). Blockbuster Video joined the prepaid card system in 1996 with its gift card. Christopher B. Woods, *Update on Prepaid Card Laws and Regulations*, 61 CONSUMER FIN. L. Q. REP. 815, 815 (2007). Prepaid cards are now widely used and infiltrate various aspects of American life under the guise of phone cards, flex spending account cards, prepaid debit cards, government benefit cards, payroll cards, and transportation system cards to name a few. *Id.*

⁸ The evolution of stored value products (“SVPs”) can be traced to the advent of digital electronic recording technologies. Gary W. Lorenz, *Electronic Stored Value Payment Systems, Market Position, and Regulatory Issues*, 46 AM. U. L. REV. 1177,

broader in scope, reaching from prepaid cards honored on traditional credit card networks, to merchant-based stored products, to prepaid cellular service.⁹

Stored value products ("SVPs") intersect numerous policy constructs. First, SVPs are primarily payment mechanisms, touching on commercial law policies that encourage enhanced liquidity and efficiency.¹⁰ As a payment mechanism, the

1177–81 (1997). Categorized as either on-line or off-line, the cards are tied to a specific cardholder with a specific amount of value placed on the card. *See id.* at 1178–79. The balance is magnetically recorded when purchased from a merchant and then money can be either added through consumer pre-payment or deducted when used for the purchase of goods or services. *See id.* The major difference between a SVP that is on-line is that it is generally registered to a specific individual and the funds applied to it are recorded in a centralized database. *Id.* at 1179. The card accepting terminal and database are on-line as they are linked through a data communications channel either permanently or minimally at the time of purchase. *Id.* Starbucks and Cricket Wireless rewards cards, for instance, are examples of on-line stored value cards. *Id.* Gift cards and prepaid phone cards are off-line; neither require the cardholder to register to use the card nor provide authorization through a personal identification number ("PIN") or other form of identification at the time of purchase. *Id.* Consequentially, if lost, the money tied to the card is irretrievable. *Id.*

Gift cards are categorized as either open or closed loop. Sean M. Diamond, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 EMORY L.J. 971, 976 (2011). The distinct characteristics of a closed-loop card is that: (1) the card's account is issued and maintained by a merchant; (2) the card stores a fixed monetary amount; and (3) the card is redeemable only at the issuing retailer. *Id.* In contrast, open-loop gift cards are: (1) offered by financial institutions; (2) operate across the debit or credit card networks; and (3) can be used at any retailer that accepts the issuer's logo—for example, Visa or MasterCard—in debit or credit card form. *Id.*

The question of how to regulate SVPs faces a similar problem previous payment innovations faced. As Clayton Gillette said in the mid-1990s, "The law of payments, therefore, contains a puzzle. Why should regulations that govern functionally equivalent payment devices—checks and cards—vary in both form and substance?" Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181, 184 (1996).

⁹ The relationship between the card issuer and cardholder has been described as a contractual one; the card issuer promises to fulfill certain obligations in return for pre-payment. Eniola Akindemowo, *Contract, Deposit or E-Value? Reconsidering Stored Value Products for a Modernized Payments Framework*, 7 DEPAUL BUS. & COM. L.J. 275, 285 (2009).

¹⁰ The preferred method of transaction for many merchants has, throughout history, been cash. Lorenz, *supra* note 8, at 1178. Cash's value is known at the time of purchase, which gives a seller confidence in it and speeds up the sale. Convenience at checkout counters or for online payments as well as broad consumer access further promotes the use of SVPs as a cash replacement for the consumer who is fearful of or barred from traditional banking products due to poor credit history. *See* Ari M. Cohen, *Protecting the Underserved: Extending the Electronic Fund Transfer Act and Regulation E to Prepaid Debit Cards*, 5 BROOK. J. CORP. FIN. & COM. L. 215, 224–25 (2010). Consumer confusion surrounding SVPs stems first from

merchant serves as both intermediary and end-point recipient of the exchange: The merchant not only accepts cash for a deferred sale, but will eventually sell goods to the consumer by accepting the credit the merchant holds. But despite the SVP as a payment mechanism and the merchant as intermediary, merchants reject the label of banking or quasi-banking as descriptive of what they do, perhaps for good reason.¹¹ Second,

its credit card-like appearance and is further aggravated by the lack of uniformity and protections when compared to other electronic payment products. Mark E. Budnitz, *Stored Value Cards and the Consumer: The Need for Regulation*, 46 AM. U. L. REV. 1027, 1029–35 (1997). Despite the risk of total loss of value, the confused consumer still chooses to deal in prepaid cards because of their cash-like quality, and merchants continue to accept them for the same reasons they accept credit cards. John L. Douglas, *Stored Value Cards: The FDIC Gets It Right*, 1 ELECTRONIC BANKING L. & COM. REP. 2 (1996).

As a result, one policy objective that payments seek to further is the near cash-like quality of payments—also known as liquidity. See Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. REV. 951, 954 (1997) (noting the decline in the usage of checks as a payment method). Uniform Commercial Code (“UCC”) and Federal Reserve time delays have rendered the check least attractive as a means of payment for many merchants. See L. Ali Khan, *A Theoretical Analysis of Payment Systems*, 60 S.C. L. REV. 425, 430 n.31 (2008).

While cash offers convenience, cash payments are not accepted online or by mail; and while cash offers anonymity, there are instances, such as for high value transactions, where a purchase trail is preferable. See Zywicki, *supra* note 3, at 85. Likewise, consumers do not generally want to carry around large amounts of cash for obvious reasons, such as loss or theft. See generally *id.* Conveniences like direct deposit often times alleviate the need to make a trip to the bank, and so many workers never physically handle paychecks or the money they are worth. See generally *Building a Better Bank Card: Reaching the Unbanked with Stored Value Cards*, *supra* note 6. SVPs help to expedite the trust between merchant and consumer; whether issued by the retailer itself or backed by Visa or MasterCard, the obligation of payment shifts from the cardholder to the card issuer. Electronic currency serves to keep the wheels of commerce churning as if cash money was actually being used while simultaneously reducing the risk taken by both buyer and seller. The efficiency of stored value cards is that the value transfers to the merchant as cash payments. Douglas, *supra*. Ironically, checking remains a vital source of assets for poorer populations because of the certainty that government checks offer cashers of those checks. See Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 134 (2004).

¹¹ Merchants using SVPs reject the label of banking for two primary reasons: (1) the implication that the merchant may be required to insure “deposits” by customers; and (2) the possibility that the merchant may be required to maintain certain amounts of funds as a fiduciary of customers, cutting off the possibility of leveraging those assets. See Akindemowo, *supra* note 9, at 289. For that reason, merchants like Starbucks and Cricket Wireless make clear in their terms and conditions that they are not maintaining “deposits” nor insuring amounts held by consumers; they also make clear that they are not engaged in the act of banking.

Merchants’ desire to avoid categorizing the receipts for SVPs from consumers as deposits can be seen clearly in the most recent general counsel opinion for the

SVPs are largely consumer products marketed to consumers for the purpose of purchasing other consumer products.¹² Third, SVPs intersect questions of economic access and social mobility,

FDIC. See *General Counsel's Opinion No. 8—Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/regulations/laws/rules/5500-500.html> (last updated Apr. 20, 2014). In it, the general counsel distinguishes between open-loop and closed-loop SVP programs for the purposes of when program operators are required to pay insurance deposits. *Id.* Because funds underlying open-loop SVPs are “deposits” under the Federal Deposit Insurance Act (“FDI Act”), the insured financial institution holding such deposits must pay federal deposit insurance on the same. See *id.* Moreover, since 2008, the premiums for such deposits have increased, providing more incentive for merchants to avoid being characterized as either an open-loop SVP under the current scheme or, more to the point, being characterized as receiving deposits under the FDI Act, regardless of whether it operates an open-loop or closed-loop program. Starbucks and Cricket Wireless would be deemed to be closed-loop programs under the FDI Act.

Likewise, merchants desire to avoid the characterization of what they are doing as banking because it may trigger fiduciary duties to the consumer. The Federal Deposit Insurance Corporation (“FDIC”) does not deem SVP issuers to be engaged in banking with cardholders in part because of the anonymity involved and untraceable nature of the transactions. Akindemowo, *supra* note 9, at 289. Financial institutions have a fiduciary duty to a depositor to provide account records unlike its SVP counterpart, which only has to track card balances. *Id.* The banking institution also owes its depositor a duty to secure the funds through deposit insurance. *Id.* at 277.

¹² Retailer-issued SVPs give consumers a card that operates much like a credit card, but instead of incurring debt through its usage, the card accesses funds already paid until they are depleted. The cardholder can obtain all of the benefits of electronic payments without the intervening of a depository institution or a satisfactory credit score. Though run like a credit card, this card's function is more like that of a traveler's check or money order; it transmits all of the benefits of using cash onto a magnetic strip held on a plastic card. Lorenz, *supra* note 8, at 1178. SVP funds are pre-payments, not deposits, under the FDIC. The FDIC classifies SVPs as closed-loop cards because, when used, the merchant is not paid through a traditional pooled account at a depository institution. Rather, the funds already belong to the merchant. John Douglas et al., *New General Counsel's Opinion No. 8: The FDIC Provides Clarity on Deposit Insurance and Assessments on Funds Underlying Stored Value Cards*, 126 BANKING L.J. 234, 236 (2009).

A majority of prepaid cards function as one-time purchases or at least until the money is drained from their accounts. Many SVP cards can be reloaded so that the cards are used again and again. What is more, is that some cards, like pre-paid debit cards, can offer access to cash through automated teller machines (“ATMs”). The emergence of this type of SVP has many in the legal community questioning the applicability of current financial laws to SVPs. Aside from the FDIC regulations designed to protect consumers, which non-bank financial service companies can escape, the security of SVPs in comparison to traditional banks is virtually non-existent. DANIEL R. MURRAY ET AL., 2A ILLINOIS PRACTICE: UNIFORM COMMERCIAL CODE WITH ILLINOIS CODE COMMENTS art. 4 (2012).

perhaps raising a specter of consumption gentrification.¹³ As more and more consumers from different social dimensions use SVPs, questions arise about whether existing remedies available to consumers adequately address the various competing policies triggered by the use of SVPs.¹⁴

¹³ This Article offers a term of art to the emerging multi-dimensional economy that consumers find themselves within. Consumption gentrification, as defined here, is the access of consumers to markets targeted towards a different economic base. For example, the consumer that typically would select a contract-based cell phone, who instead opts for a monthly prepaid phone, or the consumer who falls outside of the typical Starbucks market because the consumer's income is below that targeted, who, nevertheless, enjoys a spice latte occasionally. Gentrification as a concept has generally been associated with the process "by which working class residential neighborhoods are rehabilitated by middle class homebuyers, landlords, and professional developers." Neil Smith, *Gentrification and Uneven Development*, 58 ECON. GEOGRAPHY 139, 139 n.1 (1982). Gentrification as an analogy is interesting because it challenges our normal assumptions regarding the development of consumer products. As one geographer noted about gentrification of neighborhoods, it "undermines the dominant assumption that filtering is a uni-directional downwards process in which lower income groups move into progressively deteriorated housing." Chris Hamnett, *The Blind Men and the Elephant: The Explanation of Gentrification*, 16 TRANSACTIONS INST. BRIT. GEOGRAPHERS 173, 173 (1991).

¹⁴ The unbanked and under-banked are the target market for SVP sales and it is presumed "because of the presumable socioeconomic differences" that SVP cardholders are less financially sound and educated than the average credit cardholder. Arnold S. Rosenberg, *Better than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 60 CONSUMER FIN. L. Q. REP. 426, 455 (2006). Moreover, many of the issues for which consumers would need adequate remedies result from fees incurred by failure to maintain an adequate balance or from fees applied from non-use or reactivation. MURRAY ET AL., *supra* note 12. Insolvency also threatens the cardholder who is less than vigilant in verifying the financial soundness of the card issuer. A less sophisticated consumer base would be less apt to investigate a card issuer's financial security. Further adding to the detriment of the SVP consumer who is unprepared for a legal battle is the issue of jurisdiction, which could prevent a low-income consumer from seeking relief at all. Budnitz, *supra* note 10, at 1036.

Low-income, unbanked and under-banked consumers, and young adults are the targeted demographic for SVP purchases. Cohen, *supra* note 10, at 215. Inexperience with banking or a bad banking history can prevent people from holding bank accounts. Also, low-income workers often cannot wait for a check to clear and have trouble maintaining a minimum balance and avoiding overdraft fees. *Id.* at 217. The allure of electronic payments is that SVPs function like credit cards without the burden of having a bank account, high credit score, or employment. Rosenberg, *supra*, at 429.

Many of the first SVPs to hit the market were in the form of campus cards for entering college students and now are often used to allow the "unbanked" to make online purchases and facilitate faster purchases at checkout counters. Additionally, prepaid debit cards act like credit cards with training wheels for many teens and young adults learning to balance a budget. Ritchie, *supra* note 7, at 207-08.

Indeed, despite the growth of SVPs as a payment option across multiple social strata, the remedies available to consumers when the payment option fails remain rather limited. Some existing remedies, which are tied to commercial law structures, fail to address the full complement of issues that consumers using SVPs face.¹⁵ For example, a consumer that funds a SVP with either a debit card or a credit card may have remedies that arise under the Electronic Fund Transfer Act ("EFTA")¹⁶ or the Truth in Lending Act ("TILA"),¹⁷ respectively. But, the availability of remedies under EFTA and TILA are, in fact, quite limited to the initial transfer of funds aspect of the transaction.¹⁸ They do not account for problems that arise from improper depletion of funds after the initial funding transaction has taken place, nor do they afford the consumer a remedy if the merchant simply fails to honor the SVP based on a purported

¹⁵ For example, SVP users run the risk of electronic malfunction, issuer solvency, privacy breach, loss, theft, and so forth, which may not be remedied under existing electronic payments law. See Budnitz, *supra* note 10, at 1036–37. The risks are identical to those incurred by credit card users, except where SVPs are concerned, the cardholder is not protected from the failings of the systems by which it runs. MURRAY ET AL., *supra* note 12.

¹⁶ 15 U.S.C. § 1693g (2012) (limiting consumer liability to fifty dollars or the amount reasonably to be avoided when reported to the banking institution and only where the card was unauthorized); 12 C.F.R. § 205.6 (2014) (implementing regulations relating to EFTA's statutory limitation).

¹⁷ 15 U.S.C. § 1643 (2012) (limiting liability for fraudulent consumer transactions to fifty dollars upon the consumer's appropriate notice to the credit card intermediary). The federal Truth in Lending Act limits the amount in unauthorized charges a credit cardholder can be held liable for fifty dollars or less, provided the cardholder notifies the issuer of fraudulent activity within two days. Daniel M. Mroz, *Credit or Debit? Unauthorized Use and Consumer Liability Under Federal Consumer Protection Legislation*, 19 N. ILL. U. L. REV. 589, 595 (1999).

¹⁸ "Unlike credit and debit cards, prepaid debit cards are not protected by consumer liability caps or a right of recredit." Cohen, *supra* note 10, at 227 (footnote omitted). Debit cardholders run the risk of losing more of their money to fraud, but in many cases banks provide the same limits that credit cards carry. See *id.* Regulation E of EFTA aims to protect consumers who use electronic payment systems; however, it does not cover stored value cards under \$100, which allows issuers to circumvent disclosure requirements that credit and debit cardholders are entitled to distribute. John L. Douglas, *Technology & Banking*, 1 N.C. BANKING INST. 37, 52 (1997). The standard disclosures involve system structure details, security risks, and forfeiture risks due to loss, theft, or insolvency. *Id.* The variety and complexity of fee structures that accompany merchant cards further complicates consumer issues and supports the need for more protection. Cohen, *supra* note 10, at 227–28. Essentially, consumers who need the most protection are getting the least by relying on prepaid cards to access their money. See Budnitz, *supra* note 10, at 1031.

dispute within the merchant's terms and conditions. For consumers, drawing the distinction between transactions involving their credit or debits cards—one form of electronic transaction—and those involving SVPs may seem quite tenuous.¹⁹

Besides the gaps that exist in complimentary regulatory schemes, other remedies also fail to adequately address consumer needs upon merchant failure. If, for example, the merchant decides that the terms and conditions of its SVP do not require the merchant to perform in the same manner that the consumers believe themselves entitled, there is little legal incentive for the merchant to act in a manner that is conciliatory towards the consumers. The consumers could attempt to enforce the terms and conditions of the contract, but likely face the often-practical hurdle that the costs of their actions are more costly than the value of the money they store with the merchant in the first place.²⁰ Additionally, the Federal Class Action Fairness Act

¹⁹ To the consumer, SVPs often look and function identically to their credit or debit card transactions, causing some scholars to suggest that it would seem reasonable for the consumer to expect prepaid cards to carry the same security and liability safeguards as their plastic cousins. Budnitz, *supra* note 10, at 1031–32.

²⁰ The costs of pursuing consumer claims has been well documented in a number of consumer law areas. See, e.g., David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 B.U. L. Rev. 1, 46 (1985) (consumer product deficiency); Saami Zain, *Regulation of E-Commerce by Contract: Is It Fair to Consumers?*, 31 UWLA L. REV. 163, 169 (2000) (e-commerce). The sophisticated consumer is just as likely to avoid litigation for payments lost as the socially or economically disadvantaged consumer because of the imbalance of loss and the cost of taking legal action. Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 81–82 (1987). Class action suits have traditionally been a way around the fear many have of fighting a legal battle against a corporate giant; it cuts costs tremendously for the plaintiff who has suffered a small loss, making litigation a reasonable option, and it provides the deterrence for unfair business practices that individual action spurs. Michael C. Duffy, Comment, *Making Waives: Reining in Class Action Waivers in Consumer Contracts of Adhesion*, 80 TEMP. L. REV. 847, 865 (2007). Class action waivers are becoming prevalent in contracts between consumers and their credit lenders and banks, in effect, disabling any method of recovery. *Id.* at 850.

Another more direct example is the dichotomy between the costs of prepaid phone cards and the costs of legal action. Prepaid phone cards are a highly sought after SVP on the market today; in 2002, long-distance calling cards accounted for more than \$3.6 billion in sales. Mark E. Budnitz et al., *Deceptive Claims for Prepaid Telephone Cards and the Need for Regulation*, 19 LOY. CONSUMER L. REV. 1, 1 (2006). Most troublesome, though, is a lack of regulation and non-existing or misleading information about fees and usage available to the consumer. *Id.* at 2. Many low-income immigrants rely on prepaid cards to call their native countries, which costs more money than they expected because of the non-disclosure of

passed in 2005 raises the criteria for class action eligibility, perhaps forestalling collective action once seen as a solution to the low-value plaintiff, and thus makes it less likely that consumers will seek to litigate the terms and conditions of their SVP agreements.²¹ And even when the consumers can enforce the terms of the contract, they often find themselves in a forum pre-selected by the merchant, absorbing costs the merchant is more prepared to absorb, and in a process which the merchant is more prepared to navigate.²²

additional international charges. *Id.* While most cost as little as ten dollars, for repeat customers on small margin budgets, the value can be a significant cost for their household budget. *Id.* at 2–3. Because prepaid calling cards tend to take advantage of vulnerable consumers, who based on their legal status in the U.S. are less likely to press legal claims they might have, the calling card industry is a prime example of consumer SVPs where few remedies prevail. *See id.*

²¹ See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1593 (2008); *see also, e.g.*, *Preira v. Bancorp Bank*, 885 F. Supp. 2d 672, 679, 681–82 (S.D.N.Y. 2012) (denying certification of class action for gift card fee litigation).

²² Seeking relief is often nixed by arbitration clauses, and financing litigation may be too burdensome, especially when the value lost on an SVP is far less than the cost to hire a lawyer. Budnitz et al., *supra* note 20, at 3. Moreover, many SVP contracts contain class action prohibitions. *Id.* Arbitration clauses have nestled into many consumer contracts for the sole purpose of preventing class action suits by limiting complainants to settle their disputes individually and, thus, eliminating many small claims from ever arising. Jane K. Winn, *Electronic Commerce Law: 2001 Developments*, 57 BUS. LAW. 541, 568 (2001).

The cost for the SVP issuer to defend a claim would be significantly disproportionate as well to the value at issue. Most gift cards, for instance, carry no more than \$56.20 at any given time, according to averages collected by First Data in 2006; a Discover Card survey calculated the average value to be forty-six dollars. Woods, *supra* note 7, at 830. Merchants make money from the sale of gift cards and can ensure that every dime stored on the card is spent at the store—most merchants do not give customers cash back if less than the value on the card is spent at the store. Ritchie, *supra* note 7, at 203. Additionally, merchants use the cards to track customer spending habits and loyalty. *Id.* The benefits for the retailer who issues prepaid cards are not transferable, though, to bank issuers not engaged in selling goods or services in exchange for the value stored on the card. Banks earn one dollar in pre-tax net income on each fifty dollars prepaid card sold, while their merchant counterparts earn seven dollars—much of the difference in profit is on account of consumers spending more than the redeemable value on a merchant's SVP. MARK FURLETTI, PREPAID CARDS: HOW DO THEY FUNCTION? HOW ARE THEY REGULATED? 9 (2004), available at http://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/events/conferences/2004/PrepaidCards_062004.pdf. To make SVPs profitable, banks introduced activation, service, maintenance, and other fees. *See id.* While the fees equate consumer forfeiture, the cards offer more protection from fraud and loss than merchant issued cards. Ritchie, *supra* note 7, at 206. But because the cards are not big money-makers for banks that issue them, adding costly litigation to the mix would drive up the risk incurred by issuers,

Just as problematic as the merchant that decides to dishonor its terms and conditions is the merchant that can no longer honor its terms and conditions because it is insolvent. Perhaps just as illusory as the potential for litigating terms and conditions against merchants is the priority that consumers enjoy should the merchant file for bankruptcy protection. Specifically, the Bankruptcy Code provides for a priority for:

[U]nsecured claims of individuals, to the extent of \$2,775 for each such individual, arising from the deposit, before the commencement of the [Bankruptcy] case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals that were not delivered or provided.²³

That priority is seventh in the list of claims allowed by the Bankruptcy Code.²⁴ Moreover, the consumers' priority is limited

possibly to the point of driving the products into extinction. *Id.* SVPs arguably allow financial institutions to tap into the multi-million dollars worth of spending power generated by young Americans, establishing relationships early on with twelve to nineteen year-olds that may be potential banking customers. *Id.* at 207–08. Another sizeable market banks attempt to reach through SVPs is the estimated nine million American households that do not hold bank accounts and another twenty-one million under-banked Americans, according to 2009 figures. FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 15 (2009), available at http://www.fdic.gov/householdsurvey/2009/full_report.pdf. However vast the demographic for SVPs, the irregular and often misleading terms and conditions the cards carry that result in lost value for the ill-informed cardholder can further deter consumers from trusting banks. Cohen, *supra* note 10, at 217–18. Furthermore, little incentive, such as high returns, exists for banks to specifically target underserved consumers so that they will likely become traditional account holders, and so many low- to moderate-income earners with spotty financial histories are simply substituting financial services with prepaid products. *Id.* The notion that prepaid cards help transition unbanked and under-banked consumers to financially served ones is disputed precisely because of complex fee structures that accompany SVPs and further fuel distrust of financial institutions. *See id.*

²³ 11 U.S.C. § 507(a)(7), (d) (2012). Of course the Bankruptcy Code's reference to deposited value does not infer a deposit relationship under the Federal Deposit Insurance Act.

²⁴ *Id.* § 507(a)(7). Other claims that precede the consumer priority are claims for: (1) domestic support obligations; (2) administrative claims on behalf of the Bankruptcy estate; (3) claims by creditors that arise in the ordinary course of the debtor's business after the commencement of the bankruptcy case, but before the appointment of an administrator over the bankruptcy estate; (4) claims up to \$12,475 for salary or benefit related compensation up to 180 days prior to the Bankruptcy petition; (5) unsecured claims for contributions to an employee benefit plan; and (6) claims by certain types of merchants engaged in agricultural production. *Id.* § 507(a)(1)–(6).

to \$2,775 of value stored prior to the commencement of the bankruptcy case.²⁵

Even with the consumers' priority in bankruptcy, the consumers' ability to recapture the value they have deposited with the merchant is subject to numerous obstacles. First, the merchant likely has used its cash receipts as security for other lenders.²⁶ Also, even if the merchant elects to reorganize, the consumers' ability to access stored value may be significantly limited. For example, in a recent bankruptcy court decision involving Sharper Image stored value cards, the bankruptcy court approved Sharper Image's plan to limit consumers' use of the card to purchases in which the value of the transaction was for double the value of the card.²⁷ A merchant could elect to require consumers to choose between filing a claim under the priority scheme of the Bankruptcy Code or accepting the new terms for use of the card value. Thus, in a way, the merchant of SVPs has become "thick as thieves" with the legal ambiguities around the product, leaving the consumer contemplating the price they paid and the merchant that dared to bite the hand that fed them.²⁸

Overlaying these lapses is the inherent inequity that is created by an SVP closed-loop system in which a consumer is deprived of a forum for a remedy, a serious legal remedy, and a legal system willing to determine the risk based on economic absorption. Legal economists might argue that SVPs do not have

²⁵ *Id.* § 507(a)(7).

²⁶ *See generally id.* Under Article 9, the type of collateral that SVPs represent are payment intangibles. U.C.C. § 9-102(a)(61) ("‘Payment intangible’ means a general intangible under which the account debtor’s principal obligation is a monetary obligation."). Payment intangibles may be used as security under Article 9. *Id.* § 9-102(a)(12)(B).

²⁷ *In re Sharper Image Corp.*, No. 08-10322 (KG) (Bankr. D. Del.). Following backlash from the National Association of Attorneys General and other consumer advocacy groups, Sharper Image withdrew its plan to honor gift cards under a modified plan. Thomas O. Bean et al., *Gaining Support from All of Your Constituencies*, 071008 ABI-CLE 301 (July 10, 2008).

²⁸ Natalie Merchant, *Thick as Thieves*, on *OPHELIA* (Elektra 1998). Retailers face unique challenges in meeting federal and state requirements when filing for bankruptcy while simultaneously trying to preserve customer relationships. Lisa M. Schweitzer & Humayun Khalid, *Retailer Bankruptcies: A Primer*, 4 PRATT’S J. BANKR. L. 641, 647 (2008). On one hand, merchants have to gain court approval to honor gift cards during bankruptcy, and on the other, some state laws prohibit them from not honoring gift cards. *Id.* A retailer who strips its customers of their stored value would be hard-pressed to find that customer loyal on the other side of restructuring. *Id.*

a substantial individual impact on a consumer to warrant collective action.²⁹ However, this Article suggests that the value of the SVP program is in the transition of the consumer from an individual to an aggregate lender—with all of the other consumers who maintain SVPs with a merchant. In this way, the transaction is not merely a question of \$100 on a single SVP product, but rather the aggregate of consumers who have loaned the merchant as much as \$1 billion in a given year.³⁰

Complicating these scenarios is the scenario in which the merchant is prominently placed in the transaction holding many roles. The merchant is the seller, the payment intermediary, and

²⁹ Legal economists tend to share the view that agreements between private parties have a way of shaping themselves to be economically beneficial absent any legal intervention. Cooter & Rubin, *supra* note 20, at 68. However, when the sophistication of contracting entities is so imbalanced as to cut off negotiating power of the consumer, market failure results. *Id.* Consumer payments are particularly vulnerable to market failure because of the disparate economic positions between SVP issuer and holder. *Id.* The consumer's lack of information regarding risk allocation and other "technical, obscure elements of the contract" they enter in a consumer payments agreement further leads to market failure. *Id.* at 70. Legal rules governing liability for losses are too complex for the average consumer and even more so for the average SVP holder to successfully bargain for if given the opportunity. *Id.* This imbalance of information and power perpetuates market failure and "presents the strongest case for [legal] intervention in the market." *Id.* Thus, the remedies for the prepaid consumer who suffers a loss, however intermittent it may seem in the marketplace, are not being addressed through the status quo negotiations between consumers and the financial institutions and merchants that issue SVPs. *Id.*

³⁰ An analogy to the economic balancing of class action lawsuits is appropriate here. As Susan P. Koniak and George M. Cohen wrote:

In the class action context, the Court's argument makes sense. Class actions that aggregate small claims, by grouping cases together, create economic incentives to bring cases that would be uneconomical if filed individually. These class actions do not necessarily displace competition that would otherwise exist; rather, they make possible claims that would otherwise not be brought. There is no competition for bringing uneconomical cases.

Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1204 (1996).

When considering the value of transactions that Starbucks has received from consumers, the aggregate amount more than raises the specter of collective action, while individually, the value pales. Starting in 2001, the Starbucks loyalty card program resulted in more than \$1 billion in total sales by 2004; in 2007 alone, the company sold more than \$1 billion in Starbucks cards, though the individual consumer may only have on average less than fifty dollars loaded at any given time. See PHILIP KEITEL, *FEDERAL REGULATION OF THE PREPAID CARD INDUSTRY: COSTS, BENEFITS, AND CHANGING INDUSTRY DYNAMICS* 13 (2010), available at <http://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/events/conferences/2011/C2011-Federal-Regulation-of-Prepaid-Card-Industry.pdf>.

the debtor. In short, the SVP transaction places the merchant and consumer in a relationship where no clear body of law defines their obligations to one another. These ambiguities and lapses in legal remedies shaping SVPs become more nuanced when considering the different stakes consumers bring to the money storage game. One highly attractive feature of SVPs is that they have managed to cross economic dividing lines where other money products have not.³¹ For example, banking accounts notoriously underserve impoverished populations, who prefer to deal in cash, rather than trust their money to banks to hold for them.³² Credit cards have become more difficult to obtain since the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Credit CARD Act"), but even before then, access to credit lines seemed to have a "redline" limitation to them; thus, since 2009, what has changed about access to credit cards is not the role of potential, but the point at which potential may be fully realized in the form of credit worthiness.³³ SVPs, on the other

³¹ The gap between the credit and debit cardholder and the consumer who is unable to gain credit is widening rather than narrowing today. For the low-income consumers with dismal credit history, even if able to gain credit, would be subject to high interest rates and behavior-based fees. Todd J. Zywicki, *Consumer Use and Government Regulation of Title Pledge Lending*, 22 LOY. CONSUMER L. REV. 425, 440 (2010).

³² Prepaid products are increasingly popular among low- to moderate-income earners who lack the creditworthiness needed to hold a credit card or bank account. Rosenberg, *supra* note 14, at 429. Employers do not pay wages in cash and so payroll cards, for instance, are a way for the unbanked worker to get around having to pay check-cashing fees, while still maintaining the liquidity of cash in practical terms. *Id.* Payroll cards function much like the debit card in that an employer can deposit funds to the card that the employee can then access with the swipe of the card at any retailer that accepts electronic payments. *Id.*

³³ Market failure in the global credit arena led to sweeping regulation of the industry by way of congressional intervention. Zachary J. Luck, Essay, *Bringing Change to Credit Cards: Did the Credit CARD Act Create a New Era of Federal Credit Card Consumer Protection?*, 5 HARV. L. & POL'Y REV. 205, 205 (2011). The Credit CARD Act forced credit card issuers to implement disclosure-oriented and substantive regulations. *Id.* at 211. Among other consumer protections, the Credit CARD Act: (1) banned credit lenders from raising interest rates without notice; (2) capped late and over-the-limit fees and banned inactivity fees; (3) required issuers to include disclosures with the calculated number of months it would take to pay off the debt if only making minimum required payments; and (4) limited credit extension to adults under twenty-one years of age. *Id.* at 209–12.

The Credit CARD Act was extended to cover gift cards but only banned service, inactivity, and dormancy fees. Cohen, *supra* note 10, at 229. Expiration dates of less than five years after issuance are also prohibited by the Credit CARD Act. 10A FREDERICK H. MILLER & SARAH JANES HUGHES, UNIFORM COMMERCIAL CODE SERIES § 2:20 (2013). The Credit CARD Act enacted by Congress suggests a

hand, enjoy a prominent place amongst both the mainstream economy users and those that sit outside the mainstream in the poorer echelons.³⁴

And as the SVP has infiltrated different economic echelons of our social fabric, consideration of adequate relief must take into account the different stakes to consumers when the law does not afford an appropriate remedy.³⁵ For example, the fact that consumers cannot purchase \$4.00 lattes from Starbucks with SVPs might not motivate collective action, whereas consumers that lose access to their pre-paid cellular service may well urge a broader collective response. At issue is an often discussed, but rarely implemented, concern for access to social mobility—at least rarely implemented in the commercial law context.³⁶

This Article engages how those social considerations interact with commercial contracting principles and payments policies to

recognition that traditional checks and balances that are supposedly inherent in the bargaining process breaks down when the unsophisticated consumer is matched up against the payments industry. See Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1514 (2007).

³⁴ SVP's widespread popularity is especially visible during the holiday season. In 2006, a survey conducted by the National Retailers Foundation found that seventy-nine percent of consumers planned to purchase at least one gift card. John T. Albers, *Stored Value Cards: Should We Know the Holder?*, 11 N.C. BANKING INST. 363, 368 (2007).

³⁵ Case-by-case litigation has historically been the way the common law governs payment devices, but the typically low value held on SVPs coupled with the typically less sophisticated consumer makes the normally sluggish process a virtually non-existent one. Gregory E. Maggs, *New Payment Devices and General Principles of Payment Law*, 72 NOTRE DAME L. REV. 753, 776 (1997). The low value of most SVPs makes litigation largely unwarranted, and added to that hurdle is the jurisdictional inconsistencies likely to follow due to various state laws and card structures. *Id.*

³⁶ To address the lack of redress, the Federal Reserve Board ("FRB") proposed in 1997 that Regulation E be expanded to cover prepaid cards that have the ability to store more than \$100 at a time, noting that losing that amount of money is not a significant setback to the individual consumer. Budnitz, *supra* note 10, at 1043. However, as Budnitz's article suggests, to the unemployed, minimum-wage earner, or person living paycheck-to-paycheck, that loss can be the difference between paying rent or fixing a broken down car needed to get to work; the loss can essentially stop social mobility in its tracks. *Id.* at 1043–44.

Regulation E was extended in 2006 to include protections for payroll cards because people's livelihoods are dependent on the value stored on them. Cohen, *supra* note 10, at 232. Holders of other prepaid cards are not so protected from liability, in part, because of the "relatively small monetary amounts involved." Budnitz, *supra* note 10, at 1028. Still, the law affords the SVP holder no shield against loss no matter how much money is at stake. Anita Ramasastry, *Confusion and Convergence in Consumer Payments: Is Coherence in Error Resolution Appropriate?*, 83 CHI.-KENT L. REV. 813, 817 (2008) (noting that even cards with large balances are not regulated by the Federal Reserve).

recommend an over-arching narrative of fairness. At the core is the desire to create balance amongst the competing interests, while recognizing the role that risk and access should play in defining the legal remedies available to consumers. To do so, the Article attempts to understand the competing interests represented by different constituents of SVPs, including consumers and merchants. In particular, the Article attempts to tell a story of two different types of consumers. The first is one whom we might not care much about, except that we likely identify more closely with this one than the other.³⁷ The other is one whom we should care about but whose interests are rarely protected adequately, and to be sure, when they are protected, it is not without a significant cost.³⁸

Part I describes how these two consumer archetypes blur together—largely through consumption gentrification.³⁹ Consumption gentrification is the availability of consumers at different economic strata to purchase the same or similar products.⁴⁰ For example, consumption gentrification would recognize the phenomenon of a high-income earner choosing to use pre-paid cellular service, traditionally a service targeted towards low-income earners; on the other side, consumption gentrification recognizes that low-income earners may be as likely to purchase high-priced coffee from Starbucks as high-income earners. Because of that blurring, this Article suggests

³⁷ Structure schemes of prepaid cards differ depending on the card issuer; the prepaid cardholder is equally diverse. Cohen, *supra* note 10, at 226–27. One constant, though, is consumer confusion. Ramasastry, *supra* note 36, at 815. At present, error resolution statutes that govern debit and credit cards do not exist to cover SVPs. *Id.* High-earning consumers who fully participate in the banking realm and hold credit cards are just as likely to fall victim to loss and also to mistakenly assume they are protected from liability due to expectations sprung from long-term use of other electronic payment products. *Id.* at 834.

³⁸ Regulating the prepaid industry would not be without compliance costs. KEITEL, *supra* note 30, at 5. Meeting the requirements, which may involve actions such as replacing existing cards with new ones containing mandatory print, etc., can be an expensive undertaking. *Id.* Any added costs will inevitably result in a dip in profits, which card issuers will then pass on to the consumer or will ultimately get out of the prepaid industry altogether. *Id.*

³⁹ The widespread availability and non-discriminatory access to SVPs melds shoppers of all economic statuses into one card-carrying consumer. Cohen, *supra* note 10, at 221. Low-income and unbanked consumers who use SVPs as an entry-level banking product may only further blur the line between traditional banking, distinguished by a fiduciary relationship, and the contractual relationship between the prepaid card issuer and holder. *See id.* at 225.

⁴⁰ *See id.*

that policy considerations should not limit their reach by judgments of purchase propriety. In short, we should not care because someone cannot buy a \$4.00 latte; rather we should care because someone did not receive the benefit of her bargain—a principle that stretches across all economic strata. Instead, we should consider whether the nature of the transaction is fair, regardless of economic strata, and: (1) whether the parties can bargain effectively to mitigate risk; or (2) whether the law adequately protects parties who cannot effectively bargain to mitigate risk.

Reconciling these social constructs against the legal remedies currently available to consumers suggests significant imbalance in the relationship that merchants and consumers share to SVPs. These imbalances are, frankly, nothing new in the consumer arena.⁴¹ We have claimed policies that purport to afford consumers greater access, which actually create far greater costs to those whom the bargain is intended to benefit.⁴² Often times, the contractual paradigms serve as barriers to consumer remedies because we do not adequately take into account the different expectations that merchants and consumers bring to the bargain. Instead of allocating risk along boundaries of fairness, we have constructed poor substitutes for fairness, like the notion of adhesion, which looks to whether the merchant's

⁴¹ Today's consumers are not contracting at all when they sign on the dotted line, accepting the terms and conditions carefully crafted by the legally-backed mega-merchant; the consumers just know they want the product or service, have to comply with the terms to get it, and hope all goes well. Katherine R. Guerin, *Clash of the Federal Titans: The Federal Arbitration Act vs. the Magnuson-Moss Warranty Act. Will the Consumer Win or Lose?*, 13 LOY. CONSUMER L. REV. 4, 4 (2001). "The vast majority of successful unconscionability claims involve poor, often unsophisticated, consumers challenging oppressive adhesion contracts foisted on them by retail merchants or credit sellers." Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 48 (2000). Middle class complainants have been less successful in unconscionability claims, suggesting that the courts expect more financially adept consumers to protect themselves against contractual abuse. *Id.*

⁴² Prepaid products do not discriminate; the consumer with unstable income or employment is no less able to obtain an SVP than the high-income, home-owning consumer. Zywicki, *supra* note 31, at 440. However, the less sophisticated consumers who utilize prepaid products because they are barred from accessing credit have little legal recourse if they suffered a loss. Cooter & Rubin, *supra* note 20, at 80. The high cost of litigation and often low monetary value at stake forces the low-income target demographic for prepaid payment products to absorb their own loss with no consequence on the part of the issuer. *Id.*

terms were ambiguous but not to whether the substance of the transaction was fair.

Part II describes how commercial law remedies are shaped across three different paradigms—time, action, and risk. When we understand that the Uniform Commercial Code (“UCC”) adopts these paradigms, not as substitutes for fairness, but as ways of measuring fairness, we can foresee a policy framework that helps narrate how the substance of new transaction types fit into broader ends of commercial trade. Because SVPs represent merchant-buyer, payor-payee, and creditor-debtor relationships, Part II will show how these concepts infiltrate all three types of commercial transactions. The time paradigm reflects the commercial choice to acknowledge the availability of certain remedies before the loss-causing event, while others are not known until the actor has suffered a loss. The action paradigm is reflected in the policy choices in which we sometimes require actors to take some affirmative action to obtain a specific remedy⁴³; other times, it requires actors to do nothing⁴⁴; and in certain circumstances, it disables other parties’ remedies, despite the affirmative actions they have taken, according to our sense of broadly shaped public policies. Lastly, the risk paradigm is reflected in ways in which actors are forced to internalize certain levels of risk before a remedy may be made available to them. For example, the UCC creates frameworks for acceptable risks for parties to undertake and unacceptable risks which the UCC would not impose on a party. Importantly, each of these concepts that form the ground floor of merchant-buyer and creditor-lender relationships is founded on notions of fairness and the inequity of hidden knowledge.

But just as merchant interests should be balanced against consumer interests, any remedy that would reshape SVPs should be considered in light of broader commercial considerations upon

⁴³ The classic example is a litigant that is forced to front his own costs to bring a legal action. Commercial policy reflects certain policy choices where parties are required to take certain actions before being afforded a remedy. For example, the filing of a financing statement under Article 9 is an affirmative act that creditors must undertake to obtain a security interest.

⁴⁴ Consumer protections expanded in 1966 with the adoption of “opt-out” class actions. Milton Handler & Michael D. Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 YALE L.J. 626, 627 (1976). Members of the identified class in a plaintiff’s complaint were automatically included but retained the option to withdraw from the class. *Id.*

which we rely. In short, because SVPs are a growing source of payment for consumers and are used by merchants to encourage greater consumption, they should be considered with broader policy objectives relating to payments. Specifically, the remedies that should be available to consumers should be weighed against their propensity to encourage liquidity and efficiency in payment transactions. Thus, Part II also considers how these payment policies are revealed to construct a payments system.

Part III then considers three different types of remedies that may be available to consumers in a SVP transaction that would offer a more fair balancing of interests between merchants and consumers: (1) require SVP merchants to insure deposits held by consumers—the FDIC model; (2) grant an automatic security interest to consumers who register their SVP with the merchant; and (3) disable other security interests to the extent that the merchant has outstanding value held as a SVP. Considering these remedies through the lens of commercial and payments policies reveals a contradicting problem of having to pick and choose the ill to be remedied. The Article ends by suggesting that such a scenario warrants a more comprehensive approach, which can only be achieved through federal regulatory oversight. In such a scenario, a regulatory agency is in the best position to craft reasonable approaches that do not leave consumers subject to ill-bargained-for terms and merchant solvency.

Understanding the overlap of existing policies—social, contracting, and payment—will minimize our tendency to reduce questions of fairness to Coasian bargains.⁴⁵ By reconsidering the

⁴⁵ The fairness of the bargain dissolves when parties' interests conflict in the sense that one party—the card issuer—is made better off only through making the other—the cardholder—worse off, and the further the two are apart on the loss-benefit spectrum, the bigger the profits. Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 296 (1992). The Coase Theorem relies on the notion that private bargaining results in more benefits, more stability, and more efficiency in free market economies. *Id.* at 297. But a products payment issuer is not truly a private bargainer, nor is the transaction costless, in that it spends ample resources in contract formation suitable for the masses. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 398 (2005). Only by joining forces in negotiations—in the aggregate—will the consumer's needs be better met through a leveling of sorts between the divide in power to manipulate the terms of a contract. Hovenkamp, *supra*, at 335. Thus, the notion that the cost of transacting is zero, and the bargaining process will lead to balanced positions on both sides of the contract, does not necessarily hold true in transactions between the consumer and credit lender. *Id.* at 296.

role of the merchant and the consumer within the transaction, we are forced to look beyond the formal labels we have collectively attached, and which merchants have voluntarily accepted, and delve into the core nature of the transaction.⁴⁶ For instance, recognizing that these transactions represent multiple aligned, unsecured creditors lending money to merchants at rates no institutional lender would consider, reiterates the inequity that current remedies available to consumers belie.⁴⁷ The fact that the merchant is given the benefit of an unsecured loan, for which it neither risks its current assets nor its future longevity, should also make us ponder why the consumer who bears all the risk has only illusory remedies to fall back upon.

⁴⁶ Perhaps no other legal discipline embraces legal realism like commercial law. For example, Karl Llewellyn famously noted:

Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing. Behind decisions stand judges; judges are men; as men they have human backgrounds. Beyond rules, again, lie effects: beyond decisions stand people whom rules and decisions directly or indirectly touch. The field of Law reaches both forward and back from the Substantive Law of school and doctrine. The sphere of interest is widening; so, too, is the scope of doubt. Beyond rules lie effects—but do they? Are some rules mere paper? And if effects, what effects? Hearsay, unbuttressed guess, assumption or assertion unchecked by test—can such be trusted on this matter of what law is doing?

Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222 (1931) (emphasis omitted). As noted by others, Llewellyn and Gilmore as fathers of the Uniform Commercial Code embraced the notion that what happens in ordinary transactions should resonate with the law. See, e.g., Margit Livingston, *Certainty, Efficiency, and Realism: Rights in Collateral Under Article 9 of the Uniform Commercial Code*, 73 N.C. L. REV. 115, 180–82 (1994) (comparing Llewellyn's style of open-ended drafting, giving parties freedom under Article 2 to craft their sales, with Gilmore's closed-off approach in Article 9, leaving courts no room for tinkering); Ellen A. Peters, In Memoriam, *Grant Gilmore and the Illusion of Certainty*, 92 YALE L.J. 8, 9 (1982) ("Grant Gilmore's commitment to the idea that certainty is illusory was not merely a commitment of theory. His writings in commercial law reveal of course a searching mind probing always for flexible solutions to problems perceived to be doctrinally intractable."); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466 (1987) (describing Karl Llewellyn's influence on Article 2 of the UCC, if not in substance, certainly in spirit).

⁴⁷ Under the unsecured aggregate creditor theory, consumers en masse give to Starbucks, in the form of prepaid or deferred sales, a substantial unsecured loan—a loan each fiscal year since 2006 amounting to between \$76 million and \$116 million in unclaimed redemptions. Likewise, in the overall gift card market, consumers in 2008 purchased more than \$65 billion in gift cards, ten percent of which went unclaimed. Erica Alini, *Governments Grab Unused Gift Cards*, WALL ST. J., June 30, 2009, at A3.

I. A DESCRIPTIVE NARRATIVE OF CONSUMER SVPS AND CONSUMPTION GENTRIFICATION

On a city block, across the street from one another, sit two storefronts—Starbucks Coffee and Cricket Wireless. Starbucks, with its soft green and white logo recognized on cups of travelers across the world, projects the calming allure of comfortable chairs, hot mocha lattes, and soft sounds. Selling what many term overpriced coffee,⁴⁸ Starbucks has become a symbol of American prosperity as Americans' go-to for coffee or other coffee-based treats.⁴⁹ To be sure, Americans of all varieties find Starbucks as common ground to engage in conversation, coffee, and cultural encounters.⁵⁰ It may not be too exaggerated to say that as Starbucks goes, so goes the American economy.⁵¹

⁴⁸ See Neil Munro, *The Diversity Economy*, NAT'L J. (July 24, 2010), <http://www.nationaljournal.com/magazine/the-diversity-economy-20100724> ("But many professional-class Americans prefer Starbucks's offerings—such as a \$4.25 venti skim spice pumpkin latte—in large part because they are served by a nose-ringed barista in a tastefully decorated salon frequented by their university-educated peers.").

⁴⁹ Starbucks has had an undeniable impact on the American coffeehouse. "In 1990, there were approximately 200 freestanding coffee houses in the United States; today there are over 14,000, with Starbucks owning about 30% of the total." Craig J. Thompson & Zeynep Arsel, *The Starbucks Brandscape and Consumers' (Anticorporate) Experiences of Glocalization*, 31 J. CONSUMER RES. 631, 631 (2004). The coffeehouse in American culture has become the not-so random place for Americans seeking casual conversation. As suggested by Rudolph Gaudio:

As a "native" participant in coffeehouse conversations, I can attest that they often do feel quite ordinary, yet my experiences in a number of cultural settings remind me that the ways in which I and other Americans organize our schedules to combine casual conversation with the consumption of food and drink in a commercial retail space are by no means natural or universal.

Rudolf P. Gaudio, *Coffeetalk: Starbucks™ and the Commercialization of Casual Conversation*, 32 LANGUAGE SOC'Y 659, 660 (2003).

⁵⁰ Some have argued that the coffeehouse itself is the incubator—nay, percolator—of diverse social interactions. See, e.g., MARKMAN ELLIS, *THE COFFEEHOUSE: A CULTURAL HISTORY* (2004). As noted by Benjamin Alan Wurgaft:

Coffeehouses, as cultural historians and philosophers have been saying ever since Jürgen Habermas's *The Structural Transformation of the Public Sphere*, were crucial testing grounds for the kind of public speech upon which liberal democracies thrive. As the argument often runs, coffeehouses presented patrons with what Habermas called an ideal speech situation, in which, forgetting one another's social station and rank, people from all classes and professions debated the issues of the day in rational terms.

Benjamin Aldes Wurgaft, 7 GASTRONOMICA: J. FOOD & CULTURE 111, 112 (2007) (reviewing MARKMAN ELLIS, *THE COFFEEHOUSE: A CULTURAL HISTORY* (2004)). This description is in direct contrast with two other prominent descriptions of participants within the coffeehouse. Compare Thompson & Arsel, *supra* note 49, at

The other store, with its own green and white display, attracts a different type of customer. This customer is usually on a budget. He seeks a service—a mobile phone—that has become ubiquitous in modern social life.⁵² Cricket Wireless is attractive to this customer base because it offers no contracts, low-cost service, and no credit checks for customers having poor credit ratings, which, if required, may be a deal-breaker.⁵³

It is not uncommon to see these two stores in close proximity to one another. Starbucks has been associated with community gentrification, as a forbearing symbol of the community's transition from poor and depressed to thriving and vibrant.⁵⁴ As one writer said:

Starbucks coffee shops work in . . . intersecting spatial tendencies. Indeed, few places work harder to at once contain *and* exploit the cultural strains of fragmentation than Starbucks. Individual Starbucks stores provide the rhetorical

634 (coffeeshop as the urban flaneur), with Gaudio, *supra* note 49 (coffeeshop as cultural space).

⁵¹ *Building a Better Bank Card: Reaching the Unbanked with Stored Value Cards*, *supra* note 6.

⁵² See *Near Ubiquitous Cell Phone Ownership*, PEW RES. CENTER (Mar. 2, 2011), <http://www.pewresearch.org/daily-number/near-ubiquitous-cell-phone-ownership/> (stating that nearly eighty-five percent of all adults own a cell phone, making it the most popular technological device in America "by far").

⁵³ Prominently displayed on Cricket Wireless's website is a banner for no contract and no activation fees. See MY CRICKET, <http://www.mycricket.com> (last visited Sept. 25, 2014). Explaining Cricket Wireless's target audience, Vice President of Muve Music, a service provided by Cricket Wireless, noted, "Cricket's customer is young, is ethnic, and tends to be middle and lower income." See Ben Sisario, *A Digital Music Option Thrives, Though Quietly*, N.Y. TIMES, Aug. 29, 2012, at B3.

⁵⁴ See, e.g., Greg Dickinson, *Joe's Rhetoric Finding Authenticity at Starbucks*, 32 RHETORIC SOC'Y Q. 5, 6-7 (2002) ("[Starbucks] has become a cultural institution that filters through a range of other popular discourses including journalism, film, television, and novels. What is crucial about Starbucks, though, is the ways it is at once a globalized consumer institution and a local place in which the mundane daily activities of sipping coffee, writing in journals, and conversing with friends are practiced."); Corey Kilgannon, *Frothing over a Starbucks in Little Colombia*, N.Y. TIMES CITY ROOM BLOG (Apr. 3, 2008, 9:35 AM), http://cityroom.blogs.nytimes.com/2008/04/03/frothing-over-a-starbucks-in-little-colombia/?_r=0 (noting that Starbucks often signals gentrification of neighborhoods where urban persons eager to engage in cultural diversity also seek coffeeshop refuges: "Did the arrival of the corporate chain signal the blandification of another special city neighborhood, one whose exotic feel came from for its Babel of languages, turbaned residents and streets lined with mom-and-pop stores selling Santeria supplies and saris; immigration services and Bollywood videos; nightclubs offering dances with women for \$2 apiece"). See generally Gaudio, *supra* note 49; Thompson & Arsel, *supra* note 49.

resources for creating coherency in the context of the seeming cultural chaos that is constitutive of postmodernity. At the same time, Starbucks, as a globalized consumer institution whose green logo seems to be colonizing coffee across the world, serves as a very visible and constitutive element of the context to which it responds. As such, Starbucks embodies the kinds of contradictions individuals themselves face. Starbucks, then, in its proffering of coherent authenticity *and* as a globalized, stylized and aestheticized consumer institution serves as a powerful cultural node that brings together apparently contradictory cultural forces.⁵⁶

Just as Starbucks targets customers that are likely to emerge in the newly gentrified neighborhoods, Cricket Wireless tends to target those persons who will likely be on their way out of the neighborhood due to increased pricing.⁵⁶ As Cricket Wireless explains in its investor's annual report: "The foundation of our business is to provide unlimited, nationwide wireless services, and we design and market our products and services to appeal to customers seeking increased value. None of our services require customers to enter into long-term commitments or pass a credit check."⁵⁷

Besides finding themselves near one another on a given city block, Starbucks and Cricket Wireless have other things in common—they use consumer stored value to promote their own business and enable smart phones for mobile money transactions using stored consumer value. In short, both companies are transforming the ways Americans think about money and access to money.⁵⁸ And both are symbolic of a growing consumption

⁵⁶ Dickinson, *supra* note 54, at 10.

⁵⁶ Paul Kapustka, *Why Prepaid Wireless Plans Are on the Rise*, PC WORLD, Jan. 2011, at 21–22 (noting that though "[o]nce associated with boring, limited phones aimed at relatively low-income users," prepaid phones are on the rise due to the economic downfall and the ability to acquire better phones at a cheaper price); Gautam Naik, *Prepaid Plans Open up Cellular-Phone Market*, WALL ST. J., Sept. 16, 1998, at B1; Elliot Spagat, *Cellphone Carriers Use "Prepay" Plans as a Draw to Lower-Income Customers*, WALL ST. J., Dec. 13, 2001, at B10.

⁵⁷ Leap Wireless International Inc., Annual Report (Form 10-K) (Oct. 28, 2013). Anecdotally, when I first considered including Cricket Wireless in this Article, a local math teacher described going to the Cricket Wireless store and paying \$2.00 on a student's parent's phone so that she could contact that parent about the student's school work. The school is located in an economically depressed area, and its students generally come from low-income and primarily minority families.

⁵⁸ Calling payments transformative is not necessarily new—though the tendency of American scholars, lawyers, and judges has been to find room for new payment technologies in existing paradigms. Nevertheless, new payments often

gentrification, where products once targeting certain economic classes are as likely found in the hands of the other as in the targeted group.

A. Starbucks and the Starbucks Card

In 2001, Starbucks launched its Starbucks card, a gift card for consumers to pass on to friends, family, and other acquaintances.⁵⁹ Early on, the Starbucks card was a stored value card, which could be reloaded by consumers. At that time, using the card provided no additional benefits to customers.

Beginning in 2008, Starbucks unveiled its Starbucks Card Rewards Program.⁶⁰ The rewards program offered customers

transform the way we think about how the law interacts with commerce. See James F. Bauerle, *Headnote: Au Revoir Nextcard, Bonjour PayPal*, 119 BANKING L.J. 499, 500 (2002) (noting that new technology success depends less on their ability to invent new "paradigm[s]" than on their ability to recognize and manage new manifestations of age-old risks in a rapidly changing business"). For example, PayPal's emergence challenged legislatures to consider whether PayPal should be considered as performing bank-like functions or is a new form of e-commerce. See *id.* Analysts considering money storage often deal on the cusps of categorizing the new payments as either one of bank-like functions or contractual obligation. Compare Akindemowo, *supra* note 9, at 278 (arguing that SVPs should be treated as "technology-enabled contractual constructs rather than deposits"), with General Counsel's Opinion No. 8; Stored Value Cards, 61 Fed. Reg. 40,490, 40,494 (Fed. Deposit Ins. Corp. Aug. 2, 1996), Definition of "Deposit"; Stored Value Cards, 69 Fed. Reg. 20,558, 20,563 (Fed. Deposit Ins. Corp. Apr. 16, 2004) (to be codified at 12 C.F.R. pt. 303), Electronic Fund Transfers, 61 Fed. Reg. 19,696, 19,698 (Fed. Reserve Sys. May 2, 1996) (to be codified at 12 C.F.R. pt. 205), Electronic Fund Transfers, 69 Fed. Reg. 55,996, 55,997 (Fed. Reserve Sys. Sept. 17, 2004) (to be codified at 12 C.F.R. pt. 205), and Electronic Fund Transfers, 71 Fed. Reg. 51,437, 51,438 (Fed. Reserve Sys. Aug. 30, 2006) (to be codified at 12 C.F.R. pt. 205). See also Olujoke E. Akindemowo, *Electronic Money Regulation: A Comparative Survey of Policy Influences in Australia, the European Union and the United States of America*, 11 J.L. & INFO. SCI. 61, 61-62 (2000); The Task Force on Stored-Value Cards, *A Commercial Lawyer's Take on the Electronic Purse: An Analysis on Commercial Law Issues Associated with Stored-Value Cards and Electronic Money*, 52 BUS. LAW. 653, 654 (1997).

⁵⁹ The first Starbucks card was unveiled at the annual Starbucks employee conference in February 2001. BUCKSCARDS.COM, <http://buckscards.com/history.htm> (last visited Sept. 25, 2014). Shortly thereafter, Starbucks began rolling out cards in test markets: first in the Seattle, Washington area, then Boise, Idaho; Vancouver; Washington; and selected stores in Oregon. *Id.* The first transaction using a Starbucks card occurred on April 20, 2001, while stores in Boise, Idaho; Vancouver; Washington; and Oregon began accepting cards in June and July of 2001. *Id.* Starbucks issued a nationwide rollout of the cards on November 14, 2001, to coincide with the holiday season. *Id.*

⁶⁰ See Howard Schultz Transformation Agenda Communication #1, STARBUCKS (Jan. 6, 2008), <http://web.archive.org/web/20131106233052/http://news.starbucks.com/news/howard-schultz-transformation-agenda-communication-1>; Howard

who used their Starbucks card to pay for purchases additional perks, such as free in-store wireless internet, free add-ons to drinks, and free refills on hot and iced coffees.⁶¹ Beginning in November 2008, Starbucks extended its rewards program to allow consumers to purchase “gold card” status for twenty-five dollars, entitling them to ten percent off purchases in stores, a complimentary beverage on the holder’s birthday, and free Wi-Fi access two hours daily.⁶² The gold card’s other important feature was allowing cardholders to reload and auto-reload via the Starbucks member website.⁶³ In December 2009, Starbucks consolidated its Starbucks Rewards and its Starbucks Gold Rewards Programs into a single rewards program.⁶⁴ After restructuring, gold membership became activated upon using the Starbucks card thirty times in a calendar year.⁶⁵

Also in 2009, Starbucks began beta testing its Starbucks card mobile app. Initially launched for the iPhone, the app was designed to allow consumers to check their balances and

Schultz Transformation Agenda Communication #3, STARBUCKS (Jan. 30, 2008), <http://news.starbucks.com/news/howard-schultz-transformation-agenda-communication-3> (on file with author); *Starbucks Takes Next Step in Putting Money Back in Loyal Customers’ Wallets*, STARBUCKS (Nov. 11, 2008), <http://news.starbucks.com/news/starbucks-takes-next-step-in-putting-money-back-in-loyal-customers-wallets> (on file with author).

⁶¹ *Starbucks Takes Next Step in Putting Money Back in Loyal Customers’ Wallets*, *supra* note 60.

⁶² *Id.* Starbucks CEO, Howard Schultz, said:

We are also receiving recognition for listening to our customers during these tough economic times. Based on the responses received from over 1 million newly registered Starbucks card holders since we launched the program in April, we will enhance and take our Starbucks Card Rewards program to the next level of increased value in the fall. This will continue to demonstrate our sensitivity to current economic conditions, as well as further our attachment with our customers.

Starbucks Continues To Implement Transformation Plan, Announces Organizational Changes To Support Long-Term Growth, STARBUCKS (July 29, 2008), <http://investor.starbucks.com/phoenix.zhtml?c=99518&p=irol-newsArticle&ID=1180761&highlight=>.

⁶³ Sometime in 2009, Starbucks began sending to “Gold” customers—who were the most loyal—a Starbucks “Gold Black” card, which opened a more extensive array of benefits.

⁶⁴ *Starbucks Consolidates Card Programs for Easier, More Rewarding Loyalty Program*, BLOOMBERG (Oct. 30, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=asvLS9JV1f78>.

⁶⁵ *Id.*

conveniently reload their Starbucks cards from their iPhone.⁶⁶ At the same time, Starbucks began beta testing its payment app in stores in Seattle, Washington and Northern California.⁶⁷ Early in 2010, Starbucks continued the beta test of the mobile payments system in two distinct markets—Target store-based Starbucks locations in March 2010 and New York City Starbucks locations in October 2010.⁶⁸ Then, on January 19, 2011, Starbucks announced a national rollout of mobile payments in all U.S. stores.⁶⁹

Since their unveiling, the Starbucks card and the mobile app have been an overwhelming success. In 2010, Starbucks reported that Starbucks card sales and reloads topped \$1.5 billion. Activations and reloads increase by almost \$1 billion in 2011, reaching \$2.4 billion.⁷⁰ Activations are the original sale of a Starbucks card to a consumer, while reloads represent dollars consumers spend putting money back on a card already activated. The rise of the Starbucks card and mobile app can be traced to specific innovations Starbucks offered as a part of its rewards program. Those efforts have certainly solidified the Starbucks returning customer base, if not improved its ability to attract new customers.

For example, in 2009 Starbucks experienced an economic downturn, requiring new measures to drive up profitability. Certainly, the newly revamped Starbucks card program was a part of Starbucks' efforts to drive consumers back to the coffee house despite having fewer dollars in their wallets.⁷¹ Looking across its financial data, between 2006 and 2012, Starbucks saw the financial value of activations drop in only two years—2009

⁶⁶ *Fact Sheet: Starbucks Card Mobile App & Mobile Payment*, STARBUCKS (Jan. 23, 2011), <http://news.starbucks.com/news/fact-sheet-starbucks-card-mobile-app-mobile-payment>.

⁶⁷ *Starbucks Expands Mobile Payment Test to New York City and Long Island*, STARBUCKS (Oct. 25, 2010), <http://news.starbucks.com/news/starbucks-expands-mobile-payment-test-to-new-york-city-and-long-island>.

⁶⁸ *Id.*; *Starbucks Expands Payment Capability of Its Starbucks Card Mobile App to More than 1,000 Target Stores Nationwide*, STARBUCKS (Mar. 31, 2010), <http://web.archive.org/web/20131031073015/http://news.starbucks.com/news/starbucks-expands-payment-capability-of-its-starbucks-card-mobile-app-to-mo>.

⁶⁹ *Mobile Payment Debuts Nationally at Starbucks*, STARBUCKS (Jan. 19, 2011), <http://news.starbucks.com/news/mobile-payment-debuts-nationally-at-starbucks>.

⁷⁰ See Chloe Albanesius, *Starbucks Unveils Mobile Payment System for BlackBerry, iOS, PC MAG* (Jan. 19, 2011, 9:38 AM), <http://www.pcmag.com/article2/0,2817,2375960,00.asp>.

⁷¹ See *Mobile Payment Debuts Nationally at Starbucks*, *supra* note 69.

and 2010. However, during that same period, Starbucks reloads increased 29.52% in 2009 and 49.60% in 2010. In fact, since 2006, Starbucks has increased its amount of reloads sales every year and improved every quarter from the previous year's quarter every year.⁷²

Likewise, the Starbucks mobile card app has certainly not detracted from the mobile card's allure. The card's simplicity may be partially the reason. The Starbucks mobile card payment application offered consumers with iPhones, Blackberries, and Android-based smart phones the option of paying for their products by using their mobile smart phone. Unlike other mobile payment technologies, which utilize multimedia messaging services—commonly referred to as texting—to transfer funds or Near Field Communication,⁷³ the Starbucks app displays a barcode, which can be scanned by a Starbucks barista to debit the balance that has been loaded on the mobile app.⁷⁴ The virtue of this approach is that the consumer feels like there is more control over their payments than merely communicating via wireless technology. Likewise, the ease of access on a mobile phone, in which the payment means is located immediately at hand, allows consumers to check balances and, if necessary, reload using a pre-stored credit or debit card.⁷⁵ Thus, Starbucks has managed to bring near cash-like qualities to a stored value card—instant notification of the ability to make a purchase together with the capacity to do so.⁷⁶

⁷² *Id.*

⁷³ See *Mobile Payments: An Evolving Landscape*, FED. DEPOSIT INS. CORP., <http://www.fdic.gov/regulations/examinations/supervisory/insights/siwin12/mobile.html> (last updated Jan. 3, 2013).

⁷⁴ The Starbucks mobile payment app works via a platform supported by the Starbucks card. Consumers purchase the cards in Starbucks locations through credit card, debit card, or cash transactions. Once purchased, consumers then may “associate” the card with the mobile card app on their smart phone.

⁷⁵ Consumers may also go online and purchase virtual Starbucks cards, which can then be associated with the mobile phone app. See *Get the Starbucks App for iPhone and Android*, STARBUCKS, <http://www.starbucks.com/coffeehouse/mobile-apps> (last visited Sept. 25, 2014). Consumers may also set the app to automatically reload their Starbucks card through their credit card or debit card. *Id.*

⁷⁶ Consumers may check balances immediately prior to using the card via the mobile app. Consumers pay with the app by pressing an icon that reads “touch to pay,” which then reveals a barcode, which the barista then scans to debit the card amount. Consumers then receive an updated balance after the transaction has been confirmed.

Even in the face of potential security risks, consumers continue to use the Starbucks mobile app. In mid-July 2011, software developer Jonathan Stark launched the ambitious social project called Jonathan's Card.⁷⁷ Stark purchased a Starbucks card, registered that card, and then distributed the image of that card to the world by taking a picture of the bar code.⁷⁸ He publicized the card through his website: www.jonathanstark.com, through Facebook,⁷⁹ and also through a Twitter account⁸⁰ tied to the title "Jonathan's Card."⁸¹ Those pages encouraged users to download the image of the card, take a free coffee, and then upload more money so that other users could do the same—the "take a penny, leave a penny tray" ethic found at convenience stores, only applied to cups of coffee instead; consumers were also encouraged to report back on how they used the card and other instances of community sharing.⁸² Over the four weeks—from July 20, 2011 to August 12, 2011—Jonathan's Card received substantial activity.⁸³ According to the statistics reported at the

⁷⁷ See generally *Jonathan's Card*, JONATHANSTARK, <http://jonathanstark.com/card/> (last visited Sept. 25, 2014). See also Doug Gross, *Want a Cup of Coffee? Use Jonathan's Card*, CNN (Aug. 8, 2011, 4:07 PM), <http://www.cnn.com/2011/TECH/mobile/08/08/jonathans.card.starbucks/index.html>. The dates for the statistics for Jonathan's Card use begin as a "min_date: 2011-07-20." See Aggregate Numbers Report, <http://jonathanstark.com/card/api/summary> (last visited Oct. 10, 2014).

⁷⁸ See *Jonathan's Card*, *supra* note 77. The mobile apple card works by placing an image of a bar code on a user's mobile device, which is scanned at the register. As Part II discusses, this way of accessing stored money is unique when paired with a mobile device. Starbucks has employed the barcode-based system instead of near-field communication technology because of the current scarcity of near-field payment options. See Matt Hamblen, *Starbucks Mobile Payments Perk Past 26M Transactions*, COMPUTERWORLD (Dec. 7, 2011, 2:52 PM), http://www.computerworld.com/s/article/9222481/Starbucks_mobile_pay-ments_perk_past_26M_transactions.

⁷⁹ See *Jonathan's Card*, FACEBOOK, <https://www.facebook.com/jonathanscard> (last visited Sept. 25, 2014).

⁸⁰ See *Jonathan's Card*, TWITTER, <http://twitter.com/#!/jonathanscard> (last visited Sept. 25, 2014).

⁸¹ *Jonathan's Card*, FACEBOOK, *supra* note 79; *Jonathan's Card*, TWITTER, *supra* note 80. For an image of the card, see Image of Jonathan's Card, JONATHAN STARK, <http://jonathanstark.com/images/sbux-card.png> (last visited Sept. 25, 2014).

⁸² See *Jonathan's Card*, *supra* note 77 ("Jonathan's Card is an experiment in social sharing of physical goods using digital currency on mobile phones. . . . Based on the similarity to the 'take a penny, leave a penny' trays at convenience stores in the US, I've adopted a similar 'get a coffee, give a coffee' terminology for Jonathan's Card.").

⁸³ Jonathan's Card was terminated, it appears, on August 12, 2011. The entry on the term "max_date": "2011-08-12." See Aggregate Numbers Report, *supra* note 77.

Jonathan Stark website, the card added \$13,025.99 in 917 transactions. The card was used 1,332 times.⁸⁴ The experiment worked largely because the platform for using the Starbucks card was so simplified—an image of a barcode—that it was easily replicated.

On August 12, 2011, Starbucks terminated the card.⁸⁵ Another software developer, Sam Odio, had designs of a social experiment of his own. Sam Odio wrote a script that allowed users to transfer funds donated on Jonathan's Card to a card of their own.⁸⁶ As Odio wrote in his own blog, "I've personally netted \$625 by spending less than 5 hours at Starbucks. That's enough for an iPad."⁸⁷ Sam then explained his intentions:

I'm not getting an iPad, though. Instead I'm selling the card on eBay and donating the proceeds to Save the Children. Assuming the card sells for face value I'll have fed 20 children for a month. So here's your social experiment: will people bid up the price of the card to face value (or possibly exceed it)? Or am I alone in thinking that helping a stranger find their next caffeine fix is not what we should be worried about in today's world?⁸⁸

These two social experiments revealed an important externality for consumers using the Starbucks mobile payment system—that user accounts were not secured in the same way that other financial accounts are secured.⁸⁹ To hack a user's mobile card, a wrongdoer only had to take a screen shot of the victim's mobile app barcode.⁹⁰ The fact that a barcode could be

⁸⁴ *Id.* Stark also reported that for every two people who downloaded the image of his card to drain the account, one more person added money back to the account. See Daniel Wolfe, *Starbucks Nips 'Social' Prepaid Card*, AM. BANKER, Aug. 17, 2011. In another report, Stark's card reportedly attracted more than 500 users who spent more than \$8,000 through the card. See Alex Goldmark, *Lessons from the End of the Free Starbucks Card Experiment (UPDATED) Jonathan's Card Starbucks Sharing Experiment Shut Down*, GOOD (Aug. 19, 2011), <http://www.good.is/post/lessons-from-the-end-of-the-free-for-all-starbucks-card-experiment/>.

⁸⁵ Wolfe, *supra* note 84.

⁸⁶ *Id.*

⁸⁷ *How To Use Jonathan's Card To Buy Yourself an iPad*, SAM ODIO (Aug. 12, 2011), <http://sam.odio.com/2011/08/12/i-took-625-jonathans-card/>.

⁸⁸ *Id.*

⁸⁹ For example, one website detailed the distinction between Starbucks mobile payment app and other mobile payment services. See Shane McGlaun, *Starbucks [sic] Mobile Payment App Easily Scammed by Simple Screengrab*, SLASH GEAR (Feb. 10, 2011), <http://www.slashgear.com/starbucks-mobile-payment-app-easily-scammed-by-simple-screengrab-10132483/>.

⁹⁰ *Id.*

replicated and used on multiple devices by multiple users who are not necessarily authenticated users to that account raised the technical security problem of access. When questioned about this purported security problem, Starbucks responded by pointing out the limits that the point of access conveyed. Starbucks said that other Starbucks Card users should not be concerned, because the app did not convey any financial information about the person uploading a balance. Starbucks offered reassurance to customers by stating that Starbucks offered balance protection for registered customers.⁹¹

Starbucks also affirmed the basic proposition that the Starbucks card replicated cash-like spending and therefore required cash-like controls. It advised consumers that a Starbucks card could only be synced to one mobile device at a time. It also told consumers that while the balance of an account was protected, it was only protected from the time that Starbucks was made aware of the intrusion. Put simply, Starbucks would not replenish cash spent by a wrongdoer if the customer did not put Starbucks on notice that the card was out of the customer's control.

B. Cricket Wireless and Prepaid Cellular

In 1999, Leap Wireless began offering unlimited prepaid mobile service under the brand name Cricket Wireless. Prepaid service was not new—since 1993, various carriers had offered customers low-cost, no-commitment mobile options. These options were generally seen as inferior to their post-paid counterparts—either because they offered fewer service connections, cheaper devices, or were available in fewer markets. Cricket Wireless, though, expanded the prepaid market by being the first company to offer unlimited services.

Over the past ten years, Cricket Wireless has bolstered its brand in a number of ways. First, Cricket Wireless has significantly expanded its market presence, going “nationwide” with its services. Second, Cricket Wireless offers two types of

⁹¹ *Starbucks Card Terms and Conditions*, STARBUCKS, <http://starbucks.com/card/card-terms-and-conditions> (last visited Sept. 25, 2014). The Starbucks Terms and Conditions note that the balance protection was that customers can report lost or stolen cards and Starbucks will freeze the remaining balance at the time it is reported, transfer it to a new Starbucks Card, and mail a replacement card immediately. *See id.*

prepaid wireless services. The first option, the traditional prepaid service, allows consumers to pay one month in advance. These plans offer higher-end phones at a higher monthly cost. If a consumer fails to reload their phone within sixty days of their last reload, the account is considered to have “churned” or terminated. The second option is what Cricket Wireless terms “Paygo” plans.⁹² These plans offer either monthly terms or daily terms, allowing consumers to recharge a phone for as little as \$1.50 per day. Consumers that allow their plans to lapse past the sixty-day period must pay a thirty-five dollar reactivation fee plus the pre-paid minutes to reactivate the service.

Cricket Wireless’s expansion into the prepaid market has been one that focuses on traditionally unstable communities—youth and poverty-based clientele. Both the price point of Cricket Wireless’s services and the services Cricket Wireless offers suggest that Cricket Wireless’s financial gains come from intermittent users rather than consistent long-term customers. This focus has several effects. For example, Cricket Wireless offers an unlimited music service designed to attract users to their smart phones.⁹³ Thus, consumers may actually pay more for a Cricket Wireless smart phone device, while paying nearly the same or less for its monthly service fee. What users perceive is that the added value of the service—a service which likely is attractive to the limited demographics that Cricket Wireless targets—plus the flexibility of not having a contract makes Cricket Wireless more enticing. Of course, some consumers may actually be forced to use Cricket Wireless because a poor credit rating may foreclose other mobile options.

One question that is unclear is how Cricket Wireless’s traditional means of allocating risk amongst its unstable customer base will allow it to further broaden its operations. For example, Cricket Wireless is in the process of unveiling its mobile wallet, a feature that will allow users to store money, make purchases, pay bills, and deposit checks from their Cricket Wireless smart phone. With the prepaid mobility model, several

⁹² As a part of writing this Article, I visited several Cricket Wireless stores to find out what terms might be available. One clerk told me that Cricket Wireless was in the process of phasing out the Paygo plans since they were not as profitable to the company.

⁹³ Cricket Wireless’s music service “Muve” was designed to target audiences who do not have regular access to a computer and who earn less than \$35,000 per year. See Sisario, *supra* note 53.

questions perk up relating to the Cricket Wireless mobile wallet: Is the money stored in the Cricket Wireless mobile wallet accessible outside the mobile wallet? If not, how should we view the fee to reactivate a Cricket Wireless mobile phone service—and therefore the mobile wallet?

More so, Cricket Wireless has also found inroads into the premium cellular market by adopting high-end telephones, such as the iPhone, Blackberry Curve, and other models generally reserved for contract service users. Like Starbucks, whose product is marketed to certain customers of particular income, Cricket Wireless is showing that it too can compete across economic sectors, while still fostering its target audience.

C. A Theory of Consumption Gentrification, the Unsecured Aggregate Creditor, and the Politics of Regulation

This Article makes the argument that consumption gentrification is a factor to be considered as we evaluate remedies for consumers of SVPs. I define consumption gentrification as the infiltration of market economies by those outside of those economies, without adequate protection for the most vulnerable of participants. Gentrification in geographical terms is the infiltration of lower-income housing by middle class and professional class persons, whose presence and repair then raises the value of the property beyond the reach of the original inhabitants.⁹⁴ At the core is escalation of a price market for which existing residents were not prepared.⁹⁵ Gentrification as a general idea raises issues of access and social mobility relating to the occupation of space.⁹⁶

⁹⁴ Gentrification in its conventional sense relates to the infiltration of working-class neighborhoods by middle-class homebuyers, which then drives the price of property beyond the reach of prior residents. See George C. Galster, *Gentrification as Diversification: Why Detroit Needs It and How It Can Get It*, 4 J.L. SOC'Y 29, 29 (2002) ("‘Gentrification’ is often used as a pejorative term. In many circles, gentrification connotes unscrupulous developers forcing the poor and elderly from their long-time homes so that the vacated premises can be turned over to in-moving higher-income households, presumably at sumptuous profits."); Neil Smith, *Gentrification and Uneven Development*, 58 ECON. GEOGRAPHY 139, 139 n.1 (1982).

⁹⁵ Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence, and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 31–32 (2006) (noting that despite price increases, many lower-income residents choose to devote more resources to housing, rather than leave their community).

⁹⁶ Gentrification could serve as a powerful metaphor for understanding how collective responsibilities impact individual entitlements. Metaphor, could then

Starbucks's and Cricket Wireless's development of SVPs to further their businesses prompts some distinctive questions about consumer access to funds stored with these businesses and the role that payment mechanisms play in advancing social mobility. To be sure, these two themes share common traits, though they also are distinctive social goals that should be considered.

One question that consumption gentrification raises is that of access to the implied terms of the transaction. Moreover, there is good reason, as Bob Cooter and Ed Rubin have suggested, entities like Starbucks and Cricket Wireless have spent more time and effort formulating terms and conditions that greatly benefit their own interests, while consumers have likely spent little time evaluating their own interests in light of those terms.⁹⁷ This benefit may be particularly problematic as consumers maintain different levels of sophistication in understanding the impacts of their transaction. For example, one issue that may not be clear to all consumers is the way that Starbucks concurrently maintains multiple roles in the transaction. More problematic is where consumers may assume that the transaction's similarity to other things gives rise to certain rights—that a deposit may not be a deposit, and a sale may not be a sale.

For example, Starbucks's terms and conditions make clear that Starbucks does not provide, nor does it want to be perceived as providing, banking services, probably with good reason.⁹⁸

serve as a powerful vehicle for understanding shared responsibilities and collective responses to social problems. One such use of gentrification as metaphor has asked how "people [can] be heard and understood on their own terms." See *Metaphors and Questions in Harlem*, 58 J. ARCHITECTURAL EDUC. 59, 59 (2004) (reviewing HARLEMWORLD: METROPOLIS AS METAPHOR (Thelma Golden ed., 2003)).

⁹⁷ Cooter & Rubin, *supra* note 20, at 68–69 (noting the costs of asymmetrical information on consumers).

⁹⁸ See *Starbucks Card Terms & Conditions*, STARBUCKS, <https://www.starbucks.com/card/card-terms-and-conditions> (last visited Sept. 25, 2014). Terms and conditions that indicate a distance from banking include the following: (1) "Unless otherwise required by law or permitted by this agreement, any amount on your Starbucks Card is nonrefundable and may not be redeemed for cash"; (2) "No interest, dividends or any other earnings on funds deposited to a Starbucks Card will accrue or be paid or credited to you by Starbucks"; (3) "The value associated with the Starbucks Card is not insured by the Federal Deposit Insurance Corporation (FDIC)"; "We shall have no liability for any billing error unless you provide us notice within 60 days of the date of the transaction in question. You should monitor your transactions and account balances closely"; (4) "Because your

Banks owe significant duties to their customers—including fiduciary duties—that create significant costs on banks to carry out.⁹⁹ Banks also owe reporting duties to the state agencies commissioned with governing banking activities and federal agencies, namely the Federal Deposit Insurance Corporation¹⁰⁰ and the Securities and Exchange Commission if the bank is a publicly traded company or engages in securitizing.¹⁰¹

The Starbucks SVP fits into a broader context of non-banking firms offering money storage as a means to building customer loyalty.¹⁰² This money storage is distinctive from

Starbucks Card is used like cash for purchases from Starbucks, . . . you are responsible for all transactions associated with your Starbucks Card, including unauthorized transactions. However, if your Starbucks Card is lost, stolen or destroyed, the Card can be replaced with the balance remaining on it at the time of your call, but only if you have registered it with us"; and (5) "Your Starbucks Card balance is only protected from the point in time you notify us that your Starbucks Card is missing. We will freeze the remaining balance on your Starbucks Card at the time you notify us and will load that remaining balance on a replacement Starbucks Card." *Id.*

⁹⁹ See 12 U.S.C. § 1813(q)–(r) (2012); see also Heidi Mandanis Schooner, *Fiduciary Duties' Demanding Cousin: Bank Director Liability for Unsafe or Unsound Banking Practices*, 63 GEO. WASH. L. REV. 175, 180–81 (1995).

¹⁰⁰ The FDIC requires depository institutions, which include banks and even private individuals engaged in securitizing, to insure deposits. MICHAEL P. MALLOY, *PRINCIPLES OF BANK REGULATION* 36 (3d ed. 2011). The regulations were adopted in an effort to ward off a domino effect of bank failure, like the 1920s pandemonium that shook American's confidence in the banking system. Stephen K. Huber, *Mandatory Information Disclosure About Banks*, 6 ANN. REV. BANKING L. 53, 56 (1987). The current model of the Glass-Steagall Act opens the door, however, for "bank holding companies" to engage in financial activities that are "incident" or "closely related" to actual banking activities absent any regulation. See 12 U.S.C. § 1843(c)(8). Unless the non-banking, yet admittedly financial, activity "poses a systemic risk to the financial system," it is free of SEC constraints under the Glass-Steagall Act. K. Sabeel Rahman, Note, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 HARV. J. ON LEGIS. 555, 563 (2011). Banks commonly use third parties to implement banking services; in turn, payments processing as well as development and maintenance of stored value systems now fall under the incidental non-banking category, free of Glass-Steagall Act constraints. See 12 U.S.C. § 1843.

¹⁰¹ Banks, which are also publicly traded companies, and those that issue securities are regulated by Securities and Exchange Commission provisions, mandating they report financial statements periodically, so that the financial soundness of the entity is transparent to investors. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1207 (1999).

¹⁰² See MILLER & HUGHES, *supra* note 33 (reifying that closed systems remain a type of stored value, though the legal description is as an agreement between the issuer and the customer).

transactions that merely function as a gateway to other products—for example, if the scanning of the SVP resulted in debiting a checking account or credit account in which it were tied.¹⁰³ Instead, Starbucks actually maintains balances for customers, which are tied to their Starbucks card accounts.¹⁰⁴ Starbucks reports that in 2010, consumers loaded more than \$1.5 billion on Starbucks cards.¹⁰⁵

This issue of money storage is not new in consumer transactions. Indeed, the specter of money storage became an issue with PayPal's success in the peer-to-peer payments market.¹⁰⁶ One of the principal features of the PayPal account has been the ability to maintain money for transfer in any number of directions—to other PayPal account holders or to one's own bank or credit account.¹⁰⁷ In the early part of last decade, New York, Louisiana, Idaho, and California expressed concerns that PayPal operated as an unauthorized banking business.¹⁰⁸ Scholars too have questioned how PayPal's bank-like business model can operate without the burden of regulatory oversight. As one scholar said:

It would be unfair to directly compare [PayPal's] growth rate and spread between interest income and expense to those of any depository institution. Yet it cannot be denied that eBay and

¹⁰³ The prohibition of banking firms from engaging in other forms of financial commerce has a long history dating back to the market crashes of the 1930s. See Peter J. Ferrara, *The Regulatory Separation of Banking from Securities and Commerce in the Modern Financial Marketplace*, 33 ARIZ. L. REV. 583, 583 (1991). But, nonbanking firms can replicate banking functions without being a recognized bank. See Budnitz, *supra* note 10, at 1068 (calling for regulation on non-banking firms offering money storage).

¹⁰⁴ See *Starbucks Card Terms & Conditions*, *supra* note 98 (describing funds held as a "prepayment" for goods).

¹⁰⁵ See *Supplemental Financial Data*, STARBUCKS (2014), <http://investor.starbucks.com/phoenix.zhtml?c=99518&p=irol-financialhighlights>. Starbucks takes in a jolting amount of money through its customer card; money on which it sits until claimed—perhaps if claimed would be more precise. According to the company's supplemental financial data, Starbucks has steadily influenced card-carrying customer habits each year since 2006. Collectively, consumers trusted the coffee corporation with more than \$1 billion in 2007, and every year after, with newly stored payments peaking at \$2.1 billion in 2011. *Id.*

¹⁰⁶ See Carl Kaminski, Note, *Online Peer-to-Peer Payments: PayPal Primes the Pump, Will Banks Follow?*, 7 N.C. BANKING INST. 375, 376 (2003).

¹⁰⁷ See *id.*

¹⁰⁸ See, e.g., Matt Richtel, *Technology Briefing | Internet: Another Problem for PayPal*, N.Y. TIMES (Feb. 12, 2002), <http://www.nytimes.com/2002/02/12/business/technology-briefing-internet-another-problem-for-paypal.html>.

PayPal enjoy the benefit of a business model built on the back of the nation's financial system without being burdened with the associated costs that financial institutions bear. For PayPal's system to operate, its customers must have a bank account or credit card account from which PayPal can withdraw funds being sent and to which PayPal can remit funds received for a customer's benefit. Yet the company pays no FDIC assessment, is not subject to examination and associated fees, and has no Community Reinvestment Act responsibilities. Best of all, the funds that PayPal customers send to other customers are removed from the senders' bank accounts (or charged to their credit cards) when the senders initiate the transactions. The funds remain available to PayPal for investment until the intended recipients claim the funds. Thus, PayPal receives free of charge the benefit of the banking industry's infrastructure, while being permitted to compete directly with banks for the use of funds in transit between payors and payees.¹⁰⁹

Just as the innovation of SVPs enhance access to certain payment options, that access in turn enhances social mobility.¹¹⁰ For example, the Starbucks card and its mobile app fit within the broader categories of payment mechanisms we call additive and transformative. Additive models are those that provide an alternative means of access for consumers to existing means of payment. Transformative models are those that alter the financial options available to consumers by creating new forms of economic access. Because the Starbucks card both draws on existing payment mechanisms and expands the way consumers access those options, it falls into a payment technology that is both doing something old, and something new.

As economists William Jack and Tavneet Suri have found, the safe storage and transfer of funds facilitates a number of economic benefits. As they say in their report on the economics of other mobile money platforms in developing countries:

First, it simply facilitates trade, making it easier for people to pay for, and to receive payment for, goods and services. Electricity bills can be paid with a push of a few buttons instead of traveling to an often distant office with a fistful of cash and

¹⁰⁹ James F. Bauerle, *Technology, Law, and Banking*, 123 BANKING L.J. 751, 754–55 (2006).

¹¹⁰ See William Jack & Tavneet Suri, *Mobile Money: The Economics of M-Pesa* 10–11 (Nat'l Bureau of Econ. Research, Working Paper No. 16721, 2011), available at http://www.nber.org/papers/w16721.pdf?new_window=1.

waiting in a long queue; consumers can quickly purchase cell phone credit (“airtime”) without moving; and taxi drivers can operate more safely, without carrying large amounts of cash, when they are paid electronically.¹¹¹

Like developing countries, there is a correlation between poverty rates and access to banking or credit accounts. Thus, when Starbucks—or other companies—launch a program that allows consumers to store cash value, while accessing credit-like convenience, the practice is likely to enhance social mobility. Indeed, the fact that these consumers have in hand such a device, which allows them similar financial access as their bank account or credit card, will have an impact on the way purchases shape our social environment. At the same time, innovations offering such a drastic reshaping of our social environment should give us pause to question how such technologies should be regulated.

This potential to reshape our social economy is buffered by the imbalance that consumers stand in when considering not only the disincentive merchants have for offering more balanced terms, but also proceeds merchants collect in these transactions. Considering the average consumer to Starbucks maintains a balance of less than fifty dollars, Starbucks has little incentive to negotiate more balanced terms. The consumer’s recourse towards a breaching merchant is a legal action where the costs overwhelm the value of the transaction and where the gain is

¹¹¹ See *id.* at 10. The extension of the Starbucks card to the mobile phone demonstrates the way in which the transformative practices of Starbucks can lead to consumption gentrification. Traditionally, when we describe mobile money transactions, we refer to the type of mobile money innovations taking place in developing countries. In its traditional role, mobile payments technology allows users to use their mobile phones to pay for goods on the spot, either through multimedia messaging services or through proprietary apps and readers developed by merchants to accept these payments. The idea of mobile money was initiated as a result of a focus on alleviating poverty by the United Nations millennium development goals; the goals aim to reduce poverty by fifty percent by the year 2015. To further that goal of reducing poverty, Vodafone sponsored by a fifty percent match grant established by the U.K. Government’s Financial Deepening Challenge Fund, partnered with Safaricom—Kenya’s largest mobile phone carrier—to provide an alternative to banking in Kenya. The alternative to banking was necessary because of the scarcity of banking relationships in Kenya. Studying the problem, Safaricom noted that there were more people in Kenya that owned cell phones than had banking accounts. Starting in 2007, M-Pesa’s services began to fill that void by extending normal banking services through cellular technology. By many accounts, Safaricom’s M-Pesa service has been the most successful mobile-financial service in the developing world.

likely absorbed by the litigation costs. Moreover, collective action as a class action is even more precarious, as one breach to one consumer may not be repeated on a systematic basis sufficient to form a class. And the new Class Action Fairness Act may indeed give pause to attorneys who would otherwise bring a class action matter with any potential for dismissal.¹¹²

Importantly these views of the consumer are constrained by our traditional view that remedies *generally* arise after injury. I want to offer a different perspective. Perhaps the better way to understand SVP consumers is as a single aggregate creditor, with aligned interests and the sharing of mutual risk. Indeed, from that perspective, Starbucks is not a debtor to many creditors averaging an indebtedness of less than fifty dollars. Instead, Starbucks is the debtor to a single aggregate of creditors who have loaned it more than \$1.5 billion a year with no security, non-competitive terms, and little recourse for remedying any breach. This Article suggests that consumers, as a single, unsecured aggregate creditor, warrant greater consideration of remedies by merchants.

II. SVPs IN THE SPECTER OF COMMERCIAL AND PAYMENT POLICIES

Inquiring into what remedies SVPs should be subject to forces us to consider various commercial law paradigms. First, it represents a contract for a future sale of goods or services.¹¹³ Second, it constitutes a creditor-debtor relationship, where the merchant is a debtor and the consumer a creditor.¹¹⁴ Third, it represents a financial product where consumers store money for

¹¹² See, e.g., *Preira v. Bancorp Bank*, 885 F. Supp. 2d 672, 675, 681–82 (S.D.N.Y. 2012) (denying class certification under Class Action Fairness Act for gift card class).

¹¹³ See, e.g., *Doerhoff v. Gen. Growth Props., Inc.*, No. 06-04099-CV-C-SOW, 2006 WL 3210502, at *1 (W.D. Mo. Nov. 6, 2006) (“When a customer purchases a Gift Card, there is a written agreement supplied with the card setting forth the terms and conditions for the Gift Card[] . . .”).

¹¹⁴ See *Green v. Charter One Bank, N.A.*, 640 F. Supp. 2d 998, 1004 (N.D. Ill. 2009) (rejecting claim that bank owed a fiduciary duty in favor of a debtor creditor relationship); see also *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 621 (D.N.J. 2010), *aff’d*, 669 F.3d 359 (3rd Cir. 2012), *cert. denied*, 133 S. Ct. 345 (2012) (noting the creditor-debtor relationship by merchants and purchasers of gift cards); *In re BGI, Inc.*, 476 B.R. 812, 820 (Bankr. S.D.N.Y. 2012) (determining whether gift card holders were “known creditors”). Nevertheless, gift card holders are recognized as creditors for purposes of holding a bankruptcy privilege. See 11 U.S.C. § 507(a)(7) (2012).

later use.¹¹⁵ Because SVPs are so intertwined with existing commercial paradigms, a starting place for any solution should consider how commercial law and payments law attempt to incorporate fairness into its structures.

When we think of commercial law remedies, we generally think of them as remedies against breach of the bargain between the parties. The goods ordered and paid for were not of the kind, variety, or number the parties agreed to;¹¹⁶ the date the debtor was supposed to pay his promissory note passed without payment;¹¹⁷ or the debtor failed to adhere to a condition of the security agreement, such as insuring the merchandise or providing the creditor with sales figures for a specific quarter.¹¹⁸ It is quite easy for us to think that all remedies in commercial dealings have at their core a contractual dispute between the parties. One could make the case that contractual disputes are largely about fairness and our constructed notions of justice.

I argue in this Part that the commercial law remedies—and consumer law remedies—are more nuanced than that. Notions of fairness that revolve around commercial law remedies are guided by paradigms of notice, where parties should be alerted to the remedies that are available to them. Those paradigms are time, action, and risk. That is, at the outset of the transaction, parties become aware of the various constraints they must adhere to so that their remedy is effective. The time that the remedy is contemplated allows the consumer-creditor to know what is at stake before the transaction is complete; the action required to facilitate the remedy affords the parties notice of the things they should undertake, or need not undertake, to ensure that a contemplated remedy is available; and the risk paradigm allows

¹¹⁵ See *Mann v. TD Bank, N.A.*, No. 09-1062 (RBK/AMD), 2010 WL 4226526, at *9 (D.N.J. Oct. 20, 2010) (describing gift cards as more closely resembling financial bearer instruments).

¹¹⁶ See generally U.C.C. § 2-711; William H. Lawrence, *Appropriate Standards for a Buyer's Refusal To Keep Goods Tendered by a Seller*, 35 WM. & MARY L. REV. 1635, 1640–49 (1994) (summarizing the rationale for perfect tender rule as enhanced certainty, economic efficiency, and promotion of quality standards).

¹¹⁷ See U.C.C. § 3-304.

¹¹⁸ U.C.C. § 9-601 states that a creditor's remedies arise after "default." *Id.* § 9-601(a). The U.C.C. does not venture to define default, though cases have suggested that default is either defined by the parties in their security agreement, or in the absence of agreement, by the failure to pay the obligation when due. See, e.g., *Whisenhunt v. Allen Parker Co.*, 168 S.E.2d 827, 830 (1969) (noting that the death of a debtor may constitute a default).

the parties to calculate whether the bargain is an efficient transaction. More so, though, commercial law remedies largely respond to party expectations.

Problematically, these paradigms are not always transparent to all participants. One reason may be the perception by merchants that commercial law dealings and remedies are constrained by forces external to the concepts of fairness, and are more responsive to things like legal formalities, such as the passing of risk through strategic operations and the ability to obtain knowledge before the transaction, no matter how onerous obtaining that knowledge may be. Some consumers may not be aware of various transactional remedy constraints, unlike their commercial counterparts. Other consumers may be limited by their ability to act on the remedy. Where the paradigms of time, action, and risk operate against the consumer's understanding of the transaction, we should consider whether alternative remedies should be available.

Overlaying the question of fairness is the question of social efficiency. Indeed, one primary purpose of payments systems is to ensure an efficient exchange of payment mediums that facilitate the exchange of goods and services.¹¹⁹ That efficiency is aided by structures that encourage liquidity, longevity, and trust between merchant and consumer.¹²⁰ Importantly, because SVPs are payment mechanisms, any remedy should further, not detract from, these goals.

In the first subsection, I describe how paradigms of time, action, and risk operate in traditional commercial law dealings to resonate fair dealings that commercial contracts are presumed to ensure. In the second subsection, I describe how the paradigms of longevity, liquidity, and trust inure to create efficiency and confidence in payment products.

¹¹⁹ See generally JAMES STEVEN ROGERS, *THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW* 94-124 (1995) (providing a historical discussion of the process by which bills of exchange came to be used as payment and credit devices rather than as devices for transferring funds from one location to another). See also Mann, *supra* note 10, at 958 (noting how bills of exchange enhanced liquidity of instruments and also enhanced their attractiveness in commerce).

¹²⁰ See, e.g., Mann, *supra* note 10, at 965.

A. *Paradigms of Time, Action, and Risk in Commercial Contracting*

Imagine a consumer purchases a Starbucks card worth twenty-five dollars from Starbucks to give as a gift during the holiday season. The purchaser of the card might care if the recipient can use the card or if there are limitations on the use of the card. The purchaser might also care if the recipient needs to do something to fully realize the card's worth. Knowing these things at the outset might influence the buyer's intent to purchase the item. It might also alter how the purchaser conveys the item to its future owner. This knowledge is revealed in paradigms of time, action, and risk.

1. *Time: Remedies Disclosed Before and After Risk of Loss Causing Event*

Commercial actors know certain remedies before they enter into the transaction. Notably, there are three prominent examples of pre-transaction knowledge that serve to encourage commercial actors to make deals: (1) the holder in due course doctrine¹²¹; (2) the secured creditor's access to the filing system to discover other potential secured creditors with greater priority¹²²;

¹²¹ U.C.C. § 3-302. A good-faith purchaser of a negotiable instrument without notice of competing claims to the instrument can become a holder in due course. Edward J. Janger, *The Costs of Liquidity Enhancement: Transparency Cost, Risk Alteration, and Coordination Problems*, 4 BROOK. J. CORP. FIN. & COM. L. 39, 41 (2009). The holder in due course doctrine allocates risk efficiently in that it imposes liability on the lower cost avoider: The transferee of an obligation becomes a holder in due course over an obligor. Marie T. Reilly, *The FDIC as Holder in Due Course: Some Law and Economics*, 1992 COLUM. BUS. L. REV. 165, 211 (1992). The holder in due course "is immune from all competing claims of ownership of and virtually all defenses to the obligation." *Id.* at 204. The doctrine encourages efficiency by placing the burden on the party that could have more easily avoided the loss and more cheaply insured against it. *Id.* Other byproducts of the doctrine are enhanced certainty and liquidity in the market; the holder in due course owns good title free of any worries of the creditworthiness of the obligor. Janger, *supra*, at 46.

¹²² U.C.C. § 9-501. Creditors can protect their financial interest against debtors by securing the debt through filing a UCC-1 financial statement in the state in which the debtor is registered. David D. Farrell, *Post-Filing Changes and Their Impact on the Continued Perfection of Security Interests*, 21 AM. BANKR. INST. J. 18, 18 (2002). Once filed, the first-in-time secured creditor takes first priority against any subsequent debtors through a process called "perfecting." See generally Egon Guttman, *Investment Securities as Collateral*, 36 UCC L.J. 3 (2004). However, the secured creditor is burdened with the task of monitoring the moves or name changes on the debtor's part, either of which could negate the perfecting of the priority and require the once-secured creditor to re-file or lose the protection. Farrell, *supra*, at

and (3) the consumer's implied warranty to ensure his bargain is fit and merchantable.¹²³

The holder in due course doctrine encourages the purchase of commercial paper by ensuring that the purchaser can enforce the note against its maker, regardless of personal defenses that may exist.¹²⁴ The holder in due course obtains his status by giving value for an instrument to a holder without notice of defenses.¹²⁵ Notably, the holder in due course knows at the time he purchases the instrument that he will be able to enforce the instrument in the normal course against the maker or negotiate the instrument to another holder in due course for value.¹²⁶ This pre-transactional knowledge provides the holder in due course with certainty that the value the holder expends for the note will be compensated.¹²⁷

Likewise, the ability of a creditor under Article 9 to know that the creditor has priority before ever lending money to a debtor provides the lender with a substantial level of certainty that the transaction will provide value.¹²⁸ The conscientious

40. Establishing first priority in the security interest encourages financial confidence to facilitate lending to the debtor. Emilie Beavers, Note, *Bankruptcy Law Harmonization in the NAFTA Countries: The Case of the United States and Mexico*, 2003 COLUM. BUS. L. REV. 965, 991 (2003).

¹²³ U.C.C. §§ 2-314, -315; see also Marc L. Roark, *Limitation of Sales Warranties as an Alternative to Intellectual Property Rights: An Empirical Analysis of iPhone Warranties' Deterrent Impact on Consumers*, 2010 DUKE L. & TECH. REV. 18, ¶88 (2010) (providing empirical data suggesting that consumer understanding of warranties enhances sales).

¹²⁴ U.C.C. §§ 3-302, -305(2).

¹²⁵ *Id.* §§ 3-302(2), -304(4)(a).

¹²⁶ *Id.* § 3-305. Not only does the holder in due course gain title to the negotiable instrument free from all other claims to it, but also free from all third-party defenses. Thomas B. Fiddler, Note and Comment, *An Argument for the Alteration of the UCC To Include Variable Rate Notes as Negotiable Instruments*, 9 J.L. & COM. 115, 119 (1989). The holder in due course doctrine developed as a means of assurance to creditor-buyers that the security interest was both certain and enforceable. Boris Kozolchyk & John M. Wilson, *The Organization of American States' Model Inter-American Law on Secured Transactions*, 36 UCC L.J. art. 2 (2003).

¹²⁷ The holder in due course has the most superior claim the law affords consumers, higher than even the secured creditor's. Curtis Nyquist, *A Spectrum Theory of Negotiability*, 78 MARQ. L. REV. 897, 909 (1995). Article 9 does not limit the immunity to claims granted the holder in due course in Article 3. *Id.*

¹²⁸ Secured creditors take priority over involuntary creditors to promote liquidity and efficiency of resource allocation in the financial arena. Willa E. Gibson, *Banks Reign Supreme Under Revised Article 9 Deposit Account Rules*, 30 DEL. J. CORP. L. 819, 853 (2005). Absent Article 9 priority protection, lenders would be

creditor will file a financing statement and will search the filing system to determine whether the debtor has given other security interests in the same collateral to other creditors.¹²⁹ Importantly, the secured creditor has the capacity to secure an investment before ever extending value to the debtor.¹³⁰ With few exceptions, even though the security interest does not attach until value is given, the UCC provides that the creditor's priority relates back to the creditor's properly pre-filed UCC-1 statement.¹³¹

One area where the UCC creates this pre-transaction security for consumers is in the area of consumer warranties. Under UCC 2-314 and UCC 2-315, consumers purchasing goods under a contract of sale receive implied warranties of merchantability and fitness for a particular purpose.¹³² And like the holder in due course doctrine, a security interest creates certainty in the lending transaction; the presence of basic implied warranties assures consumers of a base-line of certainties regarding their sales transaction.¹³³ What is more, federal consumer protection legislation relating to warranties requires that merchants provide a certain base-line of warranty protection when they claim to provide full or limited warranties.¹³⁴ Should the merchant decide to limit or disclaim implied warranties, this disclaimer must be clear, in certain instances identify the type of warranty to be limited or disclaimed, and, most importantly, must arise before the transaction.¹³⁵

reluctant to extend credit "because lien creditors' interests might trump their now unsecured interest in the event of bankruptcy or default." *Id.* at 853-54.

¹²⁹ U.C.C. § 9-510.

¹³⁰ *Id.* §§ 9-502(d), -509(b).

¹³¹ *Id.* § 9-502(d). Exceptions include where other creditors give value in reliance on erroneous filings. *Id.* § 9-338.

¹³² See generally Roark, *supra* note 123 (providing empirical data suggesting that consumer understanding of warranties enhances sales). However, merely providing better warranties may not always lead to enhanced consumer information. For example, in a 1979 empirical study of consumer warranties, before the passage of the Magnuson-Moss Act—federal legislation designed to provide minimum standards for written warranties—consumers reported continued dissatisfaction from dense and confusing language. See Michael J. Wisdom, Note, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117, 1146 (1979).

¹³³ See Roark, *supra* note 123 (providing empirical data suggesting that consumer understanding of warranties enhances sales).

¹³⁴ Magnuson-Moss Act, 15 U.S.C. §§ 2301-2312 (2012).

¹³⁵ *Id.* §§ 2303-2305.

That we would create remedies that arise before the loss-causing event ever occurs suggests some questions about the nature of commercial contracting and certainty. For example, why do we provide for the availability of certain remedies at the outset of a transaction? Is it because we believe that people will not undertake the transaction without certain assurances of performance, like the warranty, the holder in due course protection, or the security interest? Or could it be a question of fairness—that we recognize certain actors have better knowledge of the likely successful completion of the transaction, and, therefore, by creating avenues of remedies, we allow parties to secure themselves against unknown risks that may be well known to other parties? In reality, both concerns bolster the role of pre-transactional remedies. It is the latter, however, that often receives little discussion as a policy-animating principle.

2. Action: Remedies That Require an Act, Remedies Available Without an Act, and the Disabling of Remedies.

Besides the paradigm of time, certain commercial remedies arise because actors undertake certain actions. But interestingly, the UCC's holistic scheme of remedies embodies not only action necessary to make a remedy available, but also includes instances in which no action is needed and in which action is irrelevant to the party's rights and remedies. For example, the secured creditor must file a financing statement and execute a security agreement;¹³⁶ and the holder in due course must give value and avoid knowledge of other defenses.¹³⁷ But sometimes, the secured creditor need not file a financing statement to perfect a security interest,¹³⁸ and sometimes the holder in due course need not complete all of the formalities

¹³⁶ See, e.g., U.C.C. § 9-510 (describing conditions for a properly filed financing statement); *Id.* § 9-317 (stating the priority scheme for a properly filed financing statement).

¹³⁷ *Id.* § 3-302 (providing the requirements for a holder in due course as giving value, without knowledge of defenses, amongst others).

¹³⁸ See, e.g., *id.* § 9-324 (providing an exception for purchase money creditors to the general priority scheme).

necessary to enforce rights as a holder in due course.¹³⁹ And sometimes, even taking necessary steps, both find themselves without recourse to remedies they contemplated.¹⁴⁰

The secured creditor takes significant steps to ensure that its security interest remains intact. It may initially request the debtor to authorize the filing of a financing statement, file the statement, and then search to ensure that the debtor has not granted a security interest in the same or similar collateral to other creditors.¹⁴¹ Then, upon the execution of a security agreement by the debtor and the extension of value, the creditor's interest may be perfected.¹⁴² Likewise, the holder in due course must extend value and obtain the instrument from a holder.¹⁴³ These acts by the creditor and holder in due course are not mere formalities but, rather, represent affirmative steps they take to ensure that their value will be secured once value is extended. Conversely, if a seller does not want to honor implied warranties to consumers, the UCC requires that he take specific action to limit the remedy—specific action designed to alert the consumer that the consumer's expectation of a warranty will not be fulfilled.¹⁴⁴ Action, in other words, provides signals to parties—both direct parties to the transaction and other parties who may become involved—that creditors, sellers, and consumers have expectations that drew them into the transaction.

¹³⁹ See, e.g., *id.* § 3-301 (providing the basic shelter rule for purchasers of instruments); Timothy R. Zinnecker, *Extending Enforcement Rights to Assignees of Lost, Destroyed, or Stolen Negotiable Instruments Under U.C.C. Article 3: A Proposal for Reform*, 50 U. KAN. L. REV 111, 120 (2001).

¹⁴⁰ Article 9 provides for a number of exceptions to the secured creditor's filing. See, e.g., U.C.C. § 9-320 (providing an exception to the general rule that security interests continue in collateral after disposition for consumer disposition of secured collateral); *id.* § 9-323 (providing that secured creditors of future advances may be subject to lien creditors); *id.* § 9-338 (providing that errors or omissions in financing statements may reduce subordinate secured creditors to later filing creditors who rely on the error or absence of information). Likewise, a holder in due course may be subject to a maker who can assert real defenses or who is insolvent. See, e.g., *id.* § 3-305(a)–(b).

¹⁴¹ See, e.g., *id.* §§ 9-509, -322.

¹⁴² *Id.* § 9-203(a)–(b).

¹⁴³ *Id.* § 3-302(a)(2)(i).

¹⁴⁴ *Id.* § 2-316 (providing for the means for excluding or modifying implied warranties).

Sometimes, though, we allow creditors and purchasers of commercial paper to enforce rights as a secured party or a holder in due course without undertaking the same formal steps.¹⁴⁵ For example, the UCC allows for sellers who extend purchase money credit for the purchase of consumer goods to take priority over other creditors, even without filing a UCC-1 statement or otherwise giving any public notice.¹⁴⁶ Likewise, when debtors exchange the collateral for other goods, or sell the collateral for proceeds, the UCC attaches the security interest to those new goods or proceeds, often without the creditor having to undertake any new action.¹⁴⁷ Similarly, a purchaser of commercial paper from a holder in due course may enforce the rights of a holder in due course, even if the purchaser does not meet all of the formal requirements for being a holder in due course.¹⁴⁸

And sometimes, the UCC, legislation, and courts disable the rights of these parties, even when they have meticulously followed the formal actions required to obtain their status. For example, both purchasers of commercial paper and secured creditors may find their interests set aside if the debtor or maker of the note files for bankruptcy protection.¹⁴⁹ The holder in due course, while able to avoid personal defenses may not avoid real defenses of the maker, of which bankruptcy is one.¹⁵⁰ Moreover, the UCC generally disables the holder in due course enforcement if the maker is a consumer.¹⁵¹ The secured creditor that gives value within a forty-five day window of a debtor declaring bankruptcy may find its security interest set aside in favor of other unsecured creditors.¹⁵² Sometimes, we disable security interests because we believe they are unfair to consumers. For example, as a general rule creditors may not create a security interest in after-acquired property held by consumers unless the

¹⁴⁵ See, e.g., *id.* § 9-324 (providing for a purchase money security interest exception to the normal priority scheme of U.C.C. § 9-317).

¹⁴⁶ *Id.* § 9-324(a).

¹⁴⁷ See, e.g., *id.* § 9-315 (providing for automatic perfection for proceed); *id.* § 9-102(a)(64) (defining proceeds).

¹⁴⁸ See, e.g., *id.* § 3-301 (2002) (providing the shelter doctrine for purchasers of instruments).

¹⁴⁹ See, e.g., *id.* § 9-323(b) (2010) (providing exceptions for lien creditors on future advances).

¹⁵⁰ See, e.g., *id.* § 3-305(a)–(b) (providing exceptions to holder in due course for real defenses and insolvency).

¹⁵¹ See *id.* § 3-305(e); 16 C.F.R. § 433.3(a) (2014).

¹⁵² See, e.g., U.C.C. § 9-323(b).

interest attaches within ten days after the secured party extends value.¹⁵³ Likewise, a secured creditor who asserts automatic perfection of a purchase money security interest may find his interest in the collateral dissolved if the consumer sells the collateral to another consumer, and the creditor did not file a UCC-1 statement on the item.¹⁵⁴

Explaining why these paradigms of action, inaction, and irrelevant action exist within the UCC can at times seem to be a patchwork of consumer protection, distributive justice, and contractual fairness. I argue, that like the question of timing, the animating principle underlying the UCC is the protection of consumers and creditors from secret knowledge that would otherwise have deterred their choice to engage in the transaction.

3. Risk: Remedy Structures Allow Parties To Assess the Likelihood of Breach

Taking a step back and considering the nature of commercial law remedies and contractual obligations, one might suggest that commercial contracting is largely about risk management. The seller that passes risk of loss according to the terms of the contract puts the buyer on notice at the point where the buyer is bound to insure against the risk of loss.¹⁵⁵ Lenders choose how to mitigate their risk, whether they accept a security interest in goods, charge higher rates of interest, or both, as mechanisms for insuring against the debtor's default.¹⁵⁶ Purchasers of commercial paper have the capacity to evaluate the instrument before making the purchase; doing so enables the purchaser to determine not only who else remains liable on the instrument should the maker fail to pay the obligation, but also to evaluate their risk worthiness in the transaction.¹⁵⁷ I want to offer two

¹⁵³ See, e.g., *id.* § 9-204(b)(1).

¹⁵⁴ *Id.* § 9-320(b).

¹⁵⁵ In sales, risk of loss is transferred as a contractual matter using conventions known as "Incoterms" to designate when parties are responsible for assuming the risk of loss in transport. 7 C.F.R. § 1493.410(o) (2014); see, e.g., U.C.C. § 2-319 (F.O.B and F.A.S. Incoterms); *id.* § 2-320 (C.I.F. and C. & F. Incoterms); *id.* § 2-321 (on-arrival Incoterm).

¹⁵⁶ See generally Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997) (providing empirical reports regarding why creditors and borrowers choose secured credit or choose to not use secured credit to secure a loan).

¹⁵⁷ See U.C.C. § 3-201 (requiring that an instrument be negotiated provided the purchaser with a party to whom endorsement liability will apply under UCC sections 3-204 and 3-401).

examples as to how the UCC aids parties in evaluating the risk worthiness of a transaction: (1) the limits of remedy substitution for sales, particularly those that fail their essential purpose; and (2) the limitation of matters that may be waived by a debtor under Article 9.

One way that merchants control risk in a transaction is by limiting the types of liability they may be subject to should the transaction fail. This control of risk is subject to three major limitations under Article 2. First, the parties may agree on a liquidated damages amount, as long as the amount is not "unreasonably large."¹⁵⁸ Second, merchants may contractually modify or limit remedies provided in the UCC as long as those new remedies do not "fail [their] essential purpose."¹⁵⁹ Lastly, merchants may not limit their exposure to consequential damages when such limitation is unconscionable; notably, the only named unconscionable limitation is the limitation of consequential damages for personal injury where the goods sold are consumer goods.¹⁶⁰

Like Article 2's limitations on merchants in sales, Article 9 limits creditors' ability to force a debtor to waive certain protections afforded by the UCC.¹⁶¹ One prominent limitation is the inability of consumers to waive the obligation that creditors not "breach . . . the peace" when using self-help foreclosure to reclaim collateral.¹⁶² This limitation ensures that creditors play fairly—at least to a certain threshold for what fair play might mean within the context of repossession of the goods.

These limitations on merchants and creditors reflect the UCC's viewpoint that even arms-length bargaining can be less than fair—at least as we might collectively measure the transaction's fairness. That consequential damages for bodily injuries and breaches of the peace are things that parties cannot

¹⁵⁸ *Id.* § 2-718(1).

¹⁵⁹ *Id.* § 2-719(2).

¹⁶⁰ *Id.* § 2-719(3).

¹⁶¹ *See, e.g., id.* § 9-602 (limiting the ability of secured creditors to alter provisions of Article 9).

¹⁶² U.C.C. § 9-609(b)(2); *see also* *Pride Hyundai, Inc. v. Chrysler Fin. Co.*, 369 F.3d 603, 613 (1st Cir. 2004); *Clarín v. Minn. Repossessors, Inc.*, 198 F.3d 661, 664 (8th Cir. 1999); *Giles v. First Va. Credit Servs.*, 560 S.E.2d 557, 565 (N.C. Ct. App. 2002); *Smith v. First Union Nat'l Bank of Tenn.*, 958 S.W.2d 113, 116 (Tenn. Ct. App. 1997); *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 29 (Tenn. Ct. App. 1991); *Chapa v. Traciers & Assocs., Inc.*, 267 S.W.3d 386, 389 (Tex. App. 2008).

avoid, even with thorough contracting, suggests that inherent in the contracting process is an understanding that certain risks should not be subject to contractual bargaining.

B. Payments and the Policies of Liquidity and Certainty

At the core of payments policy is the desire that non-currency payments be as currency-like as they can. This desire is built around the two cornerstones of promoting liquidity and certainty in the payments market.¹⁶³ Indeed, the two are not necessarily unconnected, as payments that offer instant liquidity also provide instant certainty to merchants and creditors. These two policy goals also create and rely on three distinct, yet related, concepts: Payments policy creates several interrelated goals for those engaging in the payments market—namely the goals of efficiency, trust, and longevity.

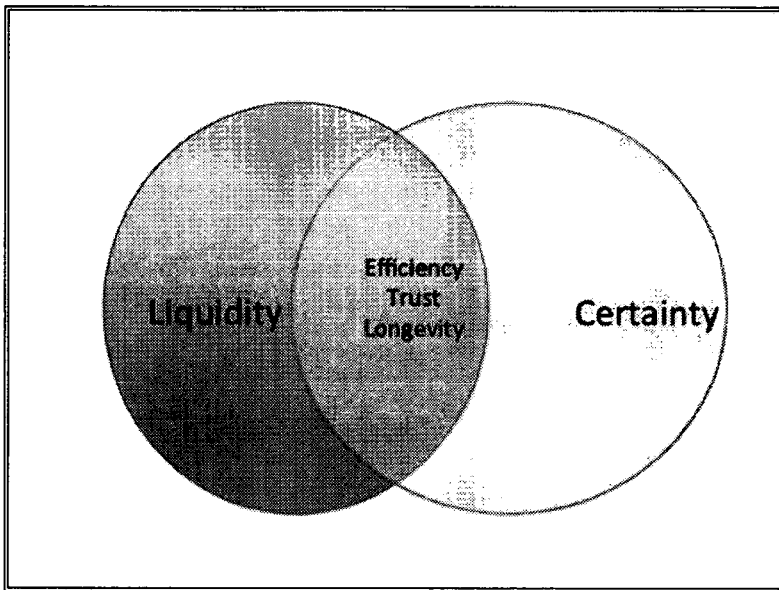


Figure 1—Liquidity and Certainty

Between liquidity and certainty lie policy constructs that undergird both. Both liquidity and certainty create these by-products inasmuch as they rely upon them. Merchants that use

¹⁶³ Mann, *supra* note 10.

payments instruments come to rely on their accuracy in affirming that the payment is indeed good. Accuracy is facilitated by a banking relationship the merchant trusts, thereby prompting the merchant to accept more payments verified by this merchant. Moreover, the faster the merchant is able to respond—in today's economy, almost instantly—and length of time the merchant sustains a relationship with the intermediary will prompt other transactions that the merchant can confidently accept.

Consumers in turn expect payments to process quickly since merchants are usually hesitant to hand over goods when payments have not been confirmed. Customers seek certainty that the payment medium is trustworthy. Longevity in the market affirms the consumer's belief that the medium is trustworthy.

Indeed, we expect payments policy to overlap in this way and even acknowledge it is happening. Liquidity is said to create certainty itself; certainty is a requisite of liquidity. Without either, the market in payments would lack the speed, trust, and longevity to provide currency-like attributes to its users and vice versa. Lather, rinse, repeat. The market thrives on these byproducts producing more liquidity and certainty for the market's functionality. Indeed, a careful inspection of past payments systems problems reveals the three constructs undergirding the overlapping policy concerns of liquidity and certainty. Importantly, any solution must account for these policies to preserve economic efficiency of payments.

1. Longevity: A Product of Liquidity and Certainty

One of the most important results of enhanced liquidity and certainty in the market is the enhanced longevity of payments on the market. Consider an example provided by Ronald Mann in 1997:

[P]osit a clothier ("Clothier") attempting to purchase wool from a wool merchant ("Merchant"). Clothier's principal source of income is from the sale of finished clothes to a factor ("Factor") that is in the business of buying finished clothes and reselling them to retailers. In an economy in which cash was the sole nonbarter payment medium, Clothier probably would obtain cash by selling finished clothes to Factor, and then would use that cash to pay Merchant for the wool. It would be considerably more convenient, however (particularly in

economies that are short of cash), if Clothier could pay Merchant with a bill of exchange (or some other form of instrument); with a documentary noncash payment, Clothier could pay Merchant without first obtaining cash from Factor. In the typical transaction using a negotiable instrument, Clothier would pay Merchant with a “draft” drawn on Factor. The draft would represent funds that Factor already owes, or in the future might owe, to Clothier for clothes purchased, or to be purchased, from Clothier. Merchant, in turn, could obtain cash by seeking payment from Factor or by selling the draft to a third party. Alternatively, Merchant could use the draft to pay for other goods and services it purchased from a third party.¹⁶⁴

The essence of longevity within the spheres of liquidity and certainty is the multi-faceted use that payments serve in the market place. Indeed, as Mann notes, payments may be used as a means of leveraging current assets by passing on debts to others who are charged to pay on your behalf.¹⁶⁵ In a system that encourages both liquidity and certainty, merchants are free to invest their assets towards expansion, which facilitates wealth creation.

Importantly, the longevity achieved through liquidity and certainty is at every level of the transaction. Once the instrument is granted certain features that extend its life beyond the pale of the single transaction, use of the payment instrument to facilitate other parties’ leveraging and wealth creation spreads the impact of the instrument beyond the initial transaction.¹⁶⁶ Thus, the great innovation of Article 9 has been the expansion in the 1999 revision of accounts-based lending; the facilitation of lending through indispensable documents, such as chattel mortgages, realty mortgages, promissory notes, payment intangibles, as well as instruments; and the simplification of creating security interests in other receivable type assets, such

¹⁶⁴ *Id.* at 956–57 (footnotes omitted).

¹⁶⁵ *Id.*

¹⁶⁶ The incorporation of accounts financing and the expansion of negotiable documents financing have been heralded as the two preeminent innovations of the 1999 revision of Article 9. *See, e.g.,* Jean Wegman Burns, *New Article 9 of the UCC: The Good, the Bad, and the Ugly*, 2002 U. ILL. L. REV. 29, 42–43 (2002) (noting two of the advancements are the ability to create a security interest in instruments and new rules pertaining to mortgage and promissory note documents).

as healthcare receipts, insurance receivables, and intellectual property licensing accounts.¹⁶⁷ By stretching the transaction outward, the payment has become more liquid.

In turn though, payment exchanges have also become more certain. Through the acceptance of payments in forms other than cash—the liquefying of non-cash items—merchants inure more certainty to the system, thereby creating longer life for instruments of payment.¹⁶⁸ The longer that merchants utilize such systems, the more networked payments policy becomes. Consider our example above of the Clothier, Merchant, and Factor. Obviously the transaction's longevity is limited by its network of potential asset holders. If, for example, Merchant's creditors do not trust a non-cash payment in exchange for Merchant's goods, then the network of potential users is limited. In other words, payment systems, even in their most basic form, require networks to achieve maximum longevity and usefulness. Someone in the circle of Merchant-Clothier-Factor must enlarge the circle of transactors to include an intermediary capable of expanding the network.

In traditional commerce, this role has been played by banks facilitating payments longevity through vast networks of creditors and debtors.¹⁶⁹ In recent years, the longevity of payments has shifted from the instrument's longevity to the intermediary's longevity in the market. We have seen this effect in two major areas: the expansion of credit card/plastic payments and the creation of non-bank third-party intermediaries.

¹⁶⁷ See, e.g., Pauline Stevens, *The Intersection of Film Finance and Revised Article 9: A Mystery*, 9 UCLA ENT. L. REV. 211, 216 (2002) (detailing how the expansion of Article 9 facilitated greater access to capital through such things as promissory notes, true consignments, and payment intangibles).

¹⁶⁸ Mann, *supra* note 10.

¹⁶⁹ Traditionally, payments like credit cards or debit cards were aided by a third-party intermediary that facilitated the trust of the consumer. As stated by one scholar:

Because a payment card network can arise only with concurrent participation by three groups of entities, the institutional environment that will support the deployment of payment cards must be one that includes favorable conditions . . . for participation by financial institutions that issue the cards, by merchants that accept the cards, and by consumers that carry them.

Barr, *supra* note 10, at 205 n.414. As noted however, Starbucks and other closed-loop systems avoid this institutional hurdle by acting as both the intermediary and the end-point recipient.

Credit card and plastic payments transactions have been on the rise since the early 1990s.¹⁷⁰ For example, in 1991, the total number of consumer payments in credit card transactions was just under \$750 billion.¹⁷¹ By 2005, that amount had risen to around \$2.5 trillion, while corresponding payments in cash and checks had both declined in the same time period.¹⁷² In a study sponsored by the Federal Reserve Bank of Philadelphia, a focus group of consumer spenders reported that their use of plastic mediums of exchange increased from seventy-eight percent in 2000 to ninety-one percent in 2008.¹⁷³ A third study, conducted by the Federal Reserve, found that between the years 2003 and 2006, non-cash payments increased 4.6%, while the number of checks written during that period declined by 4.1%; both debit card and credit card usage increased during that period.¹⁷⁴

Interestingly, consumers who reported the increase in plastic mediums of exchange during these periods also noted that merchant acceptance was one impediment to using debit or credit cards more frequently; merchant acceptance or refusal to accept plastic cards as means of exchange had a direct effect on the source of payments used.¹⁷⁵ In short, the lack of networked merchants slowed the expansion of plastic payment exchange as consumers reported that they would have used the medium more often but for the lack of conduits for using the medium of exchange. This lack of networked merchants is also revealed by the decline in private-label card use and the expansion of general-purpose credit cards. As the report describes:

[R]etailers, including Dillard's, Target, Sears, Kohl's, and Nieman Marcus, have divested their proprietary card programs

¹⁷⁰ RONALD J. MANN, *PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS: CASES, MATERIALS, AND PROBLEMS* 31 fig.I.3 (5th ed. 2011).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ HERBST-MURPHY, *supra* note 2, at 3.

¹⁷⁴ FED RESERVE SYS., *THE 2007 FEDERAL RESERVE PAYMENTS STUDY* 6 (2007). Note that in the study, the total value of payments was skewed because of the high proportion of payments made by checks in the business sector. See HERBST-MURPHY, *supra* note 2, at 4.

¹⁷⁵ See HERBST-MURPHY, *supra* note 2, at 4–5 (stating that in the categories of both debit and credit transactions, consumers noted the lack of merchants accepting plastic forms of exchange as the primary reason parties did not use plastic exchanges more). For example, in the context of debit transactions, thirty-six percent of those studied stated that they “want[ed] to pay with debit ‘all the time.’” *Id.* at 4.

as a means of infusing cash or offloading management of their loan portfolios, which have become more problematic over time, generating charge-offs running about 180 basis points higher than the GPCC average.¹⁷⁶

The retailer's solution has been to partner with general purpose credit cards rather than shoulder the burden of operating their own proprietary card program.¹⁷⁷

In short, as the emergence and proliferation of plastic mediums of exchange have demonstrated, the liquidity—or virtual cash-like availability of exchange—together with the certainty of its value have created sustained growth and longevity in the use of plastic exchanges in the overall market. This growth and longevity is in part due to the perception in the market that companies like Visa, MasterCard, and, to a lesser extent, American Express and Discover, represent longevity in the market that individual merchants want to tap into. Consumers, too, recognize that their credit profiles are perhaps best served by consolidated payments in instruments that have greater market longevity than isolated payments that may offer temporary perks.¹⁷⁸ Indeed, through airline miles, cash rebates, and other rewards programs, general purpose credit cards have managed to expand the life of a single credit purchase making dollars spent and airline miles exchanged a seamless, liquid, and certain transaction.¹⁷⁹

SVPs like the Starbucks card also afford consumers benefits for maintaining long-standing relationships with the merchants rather than short-term single transaction relationships. Starbucks "rewards" consumers with free drinks, free add-ons, and other perks for loading, reloading, and using their Starbucks card for coffee transactions. Starbucks in turn continues to reap the ongoing benefits of this relationship: both a growing customer base and a significant ongoing asset, capable of being leveraged towards its growth and expansion.

¹⁷⁶ See *id.* at 6 (footnote omitted). Murphy notes that private label credit cards declined from over 23% to 11.4% between 1990 and 2008. During that time, the number of private label cards peaked at 585 million in 2002 and then declined to 494 million by 2007. See generally THE NILSON REPORT, Issue 913, Oct. 2008.

¹⁷⁷ See HERBST-MURPHY, *supra* note 2, at 6.

¹⁷⁸ See *id.* at 6 (describing the turn in consumer spending patterns away from one-time, perk-based, private credit cards, such as Kohl's, Dillards, Target, or Sears, to expanded rewards available in general purpose credit cards).

¹⁷⁹ *Id.* at 5–6.

2. Confidence: A Product of Liquidity and Certainty

Just as longevity is an important product of liquidity and certainty, confidence and trust are equally important. For payments to work smoothly, merchants require certainty. Over time, that certainty creates institutional trust that the payments they accept will be honored or enforceable. That trust builds confidence into the system of payments, prompting more users to engage in particular payments types. Again—lather, rinse, repeat. Consider Mann's tale of the Clothier, Merchant, and Factor's use of negotiable bills of exchange in extended transactions.

From an economic perspective, the biggest problem with that arrangement is the difficulty in which it places Merchant: how can Merchant be sure that Factor or anybody else will be willing to give Merchant money or other valuable goods and services in exchange for the draft? Absent some strong reason to expect that the draft will be valuable, Merchant will be unlikely to accept the draft without insisting upon a substantial premium over the price at which it would sell goods for cash. The rules of negotiability respond directly to that problem by making it easier for Merchant to sell the draft—by enhancing its liquidity.¹⁸⁰

Enhanced liquidity through negotiability and nearly instantaneous transactions has prompted greater certainty in the payments system. Legal innovations such as negotiability, the holder in due course doctrine, merger doctrine, and the ease of creating security interests in payment devices such as instruments and accounts have led to greater certainty and therefore greater liquidity. Likewise, technical innovations, which have led to point of sale technology, and instantaneous acceptance of checks through technical and legal innovation have bolstered confidence in payments received. Fundamental to these innovations is the trust that merchants, purchasers, and payment-intermediaries have that either quick decisions regarding the payments' effectiveness or the known negotiable impacts of discounting paper will not result in losses from unscrupulous payments. In short, underlying these assumptions is Merchant's—and others'—trust that the investment it makes in an instrument or acceptance of credit from an intermediary

¹⁸⁰ See Mann, *supra* note 10, at 957.

will not go unpaid. Longevity provides Merchant and other transactors with tangible experience to rely upon in engaging in these transactions.

In the past, payments systems built confidence and trust through rules relating to negotiability of notes. The premise that the instrument itself could inure confidence of payment afforded third parties—and in particular networked intermediaries—the leverage to discount the note at competitive rates—not rates that reflect higher risk—which in turn meant that the note's usefulness as a tool of value would last beyond the scope of the initial debt.¹⁸¹ This network effect of confidence produced not only confidence in dealing with third parties—a macro network of transactors—but also inured confidence to closed off networks. The confidence of liquidity and certainty in instruments allowed the various airlines to trust that cashing a check for another airlines employee would not result in a loss to them.

But as payments have shifted from primarily commercial paper payments to electronic payments, confidence too has shifted. Instead of confidence that is bolstered because a paper satisfies the rules of negotiability and therefore maintains liquidity, confidence in electronic payments is prompted almost solely through confidence in the intermediary handling the payments.¹⁸² We can perceive the confidence effect of network expansion in the near universal acceptance of credit cards. Credit cards are accepted in most places today, including non-national retail stores, gas stations, doctor's offices, automobile service centers, hair salons, fast-food outlets, and drug and grocery stores. The speed by which merchants learn of credit payment decisions is instantaneous, prompting greater trust in the system. The network, though not perfectly liquid, achieves near liquidity by its popularity.¹⁸³ The closed network of individual credit card companies is promoted by technology that allows the near universality of the payment medium, thus achieving near liquidity status.¹⁸⁴

¹⁸¹ See Gregory E. Maggs, *The Holder in Due Course Doctrine as a Default Rule*, 32 GA. L. REV. 783, 785 (1998) (noting the holding in due course doctrine encouraged the extension of value beyond the initial transaction).

¹⁸² Barr, *supra* note 10, at 205 n.414.

¹⁸³ Mann, *supra* note 10, at 956–57.

¹⁸⁴ *Id.*

And like the effect that negotiability had in insuring confidence in closed networks, so too closed networks operate closely with near universal networks to create better confidence in the system. Consider the PayPal evolution. PayPal developed as a void in the market of online exchanges emerged.¹⁸⁵ Purchasers in Iowa seeking to purchase goods from a merchant in California were reticent to simply issue a payment on the hope that the goods would arrive. Similarly, merchant did not desire to ship goods to buyer without having the certainty of payment in hand. In short, a trust problem emerged. PayPal offered a simple way to resolve the trust issue. By depositing funds into a PayPal account, users could transfer funds between other uses.¹⁸⁶ Moreover, PayPal as intermediary guaranteed satisfaction of customers by promising to return funds if unsatisfied with the product.¹⁸⁷ Notice two things. First, the PayPal network is a micro-network because it is limited by the parties connected to PayPal.¹⁸⁸ PayPal took advantage of a macro network in the form of electronic funds transfers to establish the PayPal accounts.¹⁸⁹ Now, as electronic funds transfers have become more trusted, PayPal's limited network has also expanded. Second, and perhaps more important to this discussion, PayPal properly identified the trust aspect of distance transactions and provided a sensible solution. In many ways mirroring what banks have done with letters of credit, PayPal offered recourse to unsatisfied consumers.¹⁹⁰

This solution is not unusual, as we have long noticed that concepts like liquidity and certainty benefit the immediate transaction by making the paper worth more as an investment tool than as a medium of payment. Confidence and longevity stream forwards and backwards within the transaction, thanks in part to the third construct—speed or efficiency.¹⁹¹

¹⁸⁵ See Kaminski, *supra* note 106, at 375–76; Ronald J. Mann, *Regulating Internet Payment Intermediaries*, 82 TEX. L. REV. 681, 683 (2004).

¹⁸⁶ Mann, *supra* note 185, at 684–85.

¹⁸⁷ See David E. Sorkin, *Payment Methods for Consumer-to-Consumer Online Transactions*, 35 AKRON L. REV. 1, 25 & n.129 (2001).

¹⁸⁸ Kaminski, *supra* note 106, at 375–76.

¹⁸⁹ *Id.*

¹⁹⁰ Mann, *supra* note 185, at 687.

¹⁹¹ Normally, efficiency is referred to as stripping away obstacles from a transaction. For example, we might describe an output as efficient because it tends to create greater negotiability by stripping away potential defenses. See Mann, *supra* note 10, at 959. However, one often overlooked aspect of efficiency is the speed

3. Efficiency: A Product of Liquidity and Certainty

The third construct in the diagram is efficiency. Edward Rubin at the dawn of the 1990 revision of Article 3 and 4 stated efficiency's lure best: "No sane person engages in payment activities for the intrinsic pleasure of doing so. Payments are a means to an independently determined end. In order to obtain goods or services in a commercial culture like our own, one must pay for them."¹⁹² The speed by which payment systems may provide that end ties directly to the mutual confidence that consumers and sellers place in a particular payment medium.¹⁹³ For example, prior to the expansion of credit cards as a primary means of payments, many merchants placed restrictions on the use of checks as a means of payments, like "no out of town checks" or "no check numbers below 100." The problem was one of timing—verification of funds could take days, even weeks, prompting merchants not to trust strangers or inexperienced transactors.

As Mann notes, doctrines like merger and holder in due course allow sellers, sellers' creditors, assignees, or purchasers to evaluate the note immediately and determine its immediate worth by simplifying the potential issues against which they might not be paid:

When a document is negotiable, substantially all of the information necessary to evaluate title to the asset appears on the face of the document in its original terms or in indorsements subsequently placed on the document. At least in the absence of forgery, a person who wishes to purchase a negotiable document can verify that the purported seller can convey good title without any inquiry other than the examination of the document. If the document is in bearer form, then mere possession is enough to obtain title. The inquiry is more complicated if the document is in order form, but even then the buyer need only examine the document (including any

with which transactions can take place. Systems that offer greater liquidity also, in turn, offer speedier processes by which merchants make decisions whether the payment offered is sufficient. In the practical context, merchants that conclude the liquidity of the consumer by virtue of instantaneous credit decisions are able to decide much faster whether the transaction is one they would choose to undertake.

¹⁹² Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 561 (1991).

¹⁹³ See, e.g., *Bowling Green, Inc. v. State St. Bank & Trust Co.*, 425 F.2d 81, 85 (1st Cir. 1970) (noting that in regards to the check, "maker, payee, and endorers [sic] of a check naturally expect it will be rapidly negotiated and collected").

indorsements that appear on the document) to determine whether the seller is the person to whose order the document runs. If so, the seller can convey title to the purchaser by the simple acts of indorsement and delivery of the document.¹⁹⁴

Yet, this simplification of issues did not alleviate all concerns with the instrument. Merchants keenly realized that they could be delivering goods to customers without any guarantee of payment.

The proliferation of credit cards has alleviated some concerns of merchants by providing instant feedback regarding the “transaction-worthiness” of their consumer. Likewise, this instantaneous feedback has netted a positive impact on consumer behavior where consumers now use credit cards because they can assure themselves that the transaction will be completed—assuming of course that the consumers do not misperceive information they hold that the merchant is privy to, like the fact that their credit lines are over the limit, or that they have failed to pay the balance due on their credit lines. Of course, these pieces of information, though not provided directly to the merchant, are provided indirectly in the form of denying the credit of the consumer prior to completing the transaction.

Like credit and debit card transactions, consumers and merchants are privy to instant feedback of their transaction in an SVP setting. When the SVP is combined with mobile technology, the transaction is even more efficient since the consumers are aware before initiating the transaction whether they have the funds sufficient to conduct the purchase. These provide both consumer and merchant instant knowledge as to whether their transaction will be successful—a feature that inures the SVP for both its liquidity and certainty.

III. HOW SVP REMEDIES MIGHT ACCOUNT FOR COMMERCIAL AND PAYMENT LAW PARADIGMS

Because SVPs can be construed as a consumer contract, pre-sale, a lending agreement, and a payment mechanism, any remedy proposed to mitigate an imbalance between consumer and merchant should attempt to balance the policy aims of each of these. This Article to this point has argued that consumers are most at risk from: (1) unknown information at the outset of

¹⁹⁴ See Mann, *supra* note 10, at 960 (footnotes omitted).

the transaction; and (2) inadequate protection against merchant failure, for whom the risk of loss has not been adequately contemplated. Indeed, the consumer's post-loss actions often leave the consumer with little or no realistic remedy to pursue. Moreover, if known, they would challenge at least one of the policy ends we seek to further in payment systems—creation of confidence-building mechanisms.

Instead, consumer remedies should be available to consumers at the outset of the transaction. This knowledge of consumer remedies would build confidence in the SVP as a payment mechanism, reduce the perception of risk in the transaction, and balance the fairness of the transaction. In crafting an appropriate remedy for consumers in the SVP market, we might consider how individual problems raised by the SVP could be resolved. But in solving one problem, we do not necessarily resolve the others. For example, we could insure against the risk of loss, spreading the risk between consumer and merchant to insure that the merchant maintains adequate funds in the event of a merchant breach of terms; this approach, however, would likely not be an adequate solution to the merchant insolvency. We could impose an affirmative remedy by giving consumers legal entitlements that they could assert in a post-insolvency period, but which they would unlikely pursue in a merchant breach scenario, though they could. We could disable certain entitlements by the merchant which would insulate the consumer from loss in the event of the merchant insolvency, but which would afford the consumer no remedy in itself where the merchant breaches the terms of the transaction outside of insolvency. And we could provide mechanisms to insulate consumers for losses due to third-party wrongdoers, similar to EFTA's notice regime. But each of these solutions is a single solution to a broader problem. For a solution to fully protect consumers at all levels, reform must be comprehensive, touching not one piece of the problem, but all facets.

A. Insuring Against the Merchant's Default.

One means of protecting against merchant breach is to insure against the loss at the outset of the transaction. Merchants could be required to hold in reserve a certain percentage of receipts depending on the total value of funds the merchant holds in the aggregate on behalf of consumers.

Alternatively, merchants could be required to insure funds through a third-party insurer who could insure a portion of the total receipts for consumers that elect coverage in exchange for a premium.

Both of these approaches have distinctive downfalls. Following the Federal Deposit Insurance Corporation model might impose significant administrative and reporting requirements on merchants that could deter closed-loop merchants from using SVPs unless there was a significant financial upside. Likewise, additional regulatory costs would be inherent to insure that merchants complied with the insurance and reporting requirements.

Incorporating a third-party insurance scheme to account for risk presents different challenges. Most significantly, the cost of a third-party premium would likely be spread to customers in the form of higher costs for products. This inflation of the price point for service would work against the ends of access. Merchants could pass along the costs of insurance premiums only to consumers that elect coverage; yet, there again lies the paradox of consumer gentrification. Those consumers, who are in the best position to pay for additional security, often will reject it since the risk of loss is so low. And those consumers who most need the additional security often times are not in a position to afford such coverage. While insuring against risk sounds attractive at the outset, in many ways it feeds into other problems inherent in the transaction.

B. Creating an Affirmative Security Interest

A second solution to bring balance to the merchant-consumer relationship would be to create an automatic security interest in the value of SVP for consumers that register their SVP with the merchant. Like merchants of consumer products that create automatic purchase money security interests in items they sell, consumers could create automatic purchase money security interests in the funds reserved for future purchase with the

merchant.¹⁹⁵ Such a solution would remove inefficient barriers to remedies, such as requiring the consumer to file a UCC-1 financing statement.¹⁹⁶

Still, such a solution would require some form of validation. For example, the purchase money security interest ("PMSI") requires at the least the execution of a security agreement—or other form that satisfies UCC 9-203's requirement for attachment.¹⁹⁷ Consumers could be required to register their SVPs with the company as a means of creating a security interest. Alternatively, the mere possession of the SVP authenticated mechanism could be a sufficient means of determining who has a security interest and who does not; at least two courts have drawn an analogy between SVPs and bearer instruments.¹⁹⁸

One distinctive problem with this solution is that it requires the consumer to actively do something to create an enforceable security interest. If the action is registering by electronic transmission of information, then the question should be asked whether certain consumers are disadvantaged because they do not have the technology available that other consumers do.

¹⁹⁵ U.C.C. § 9-309(1).

¹⁹⁶ Similar logic is applied to the exemption of merchants to file for consumer goods and would validate a reverse practice if a security interest was created in consumers. As stated by numerous authors:

[T]he reasons for this exception are: (1) consumer transactions are frequently small, so the expense of filing can significantly add to the price that the consumer will have to pay; (2) consumer transactions are very numerous and they would unduly burden the filing system; (3) the pre-Code rule in most states did not require filing in conditional sale transactions; and (4) parties to consumer transactions are less likely to search the records.

Timothy R. Zinnecker, *Pimzy Whimsy in the Eleventh Circuit: Reflections on In re Alphatech System, Inc.*, 40 GONZ. L. REV. 379, 382 n.19 (2005) (quoting ROBERT L. JORDAN ET AL., SECURED TRANSACTIONS IN PERSONAL PROPERTY 94 (5th ed. 2000)); see also David Gray Carlson, *Purchase Money Under the Uniform Commercial Code*, 29 IDAHO L. REV. 793, 795 (1992) ("[I]f every purchase money security interest in consumer goods were subject to a filing rule, the files would be clogged with unedifying financing statements to the point where the system might break down—and the very lives of the clerks might be at risk—under the crush of a paper avalanche.").

¹⁹⁷ U.C.C. § 9-203.

¹⁹⁸ See *Mann v. TD Bank, N.A.*, No. 09-1062 (RBK/AMD), 2010 WL 4226526, at *9 (D.N.J. Oct. 20, 2010) ("[F]rom the perspective of contract law, the gift cards in this case are most closely analogous to bearer financial instruments."). See generally *PrivaCash, Inc. v. Am. Express Co.*, 747 F. Supp. 2d 1114 (W.D. Wis. 2010).

While this solution eliminates the cost-barrier to both merchant and consumer that the insurance model contains, it also is limited in that it may not provide relief to the consumer outside of the instance where the merchant finds himself insolvent. Notably, the cost ratio between actions to enforce a default and the value of the transaction weigh considerably against the consumer's use of the courts to bring a claim. Additionally, while Article 9 affords parties the ability to shape their agreement and provide for alternative remedies—amongst which might include attorneys' fees¹⁹⁹—it is unlikely that a merchant would include attorneys' fees in its agreement in the event of a breach. Thus, more than likely the consumer's security interest only would secure against the possibilities of insolvency, not breach.

A second concern is the potential for impairing third-party security interests where the third party was unaware of the consumer interests. Unlike the automatic PMSI for consumer goods available in Article 9, the automatic PMSI for SVPs could not provide a means for creditors to enhance their security interest. Consumer good PMSI creditors under Article 9 can protect their security interest against the acts of the debtor by filing a UCC-1 statement, though it is inefficient and many creditors will elect not to do so. Since an automatic PMSI on SVP would not require consumers to file a UCC-1 financing statement, the potential for impairing other third-party creditors could exist. Third-party creditors would be dependent on the merchant-debtor to be forthcoming as to the amount of SVP products currently perfected by consumers. The policy underlying an automatic PMSI interest that supersedes another creditor's interest is that the value of the collateral is generally small. In this case, the aggregate value would not be small—in Starbucks case, near \$1 billion. Moreover, it is unlikely that we could enhance competing creditors' claims without defeating the very purpose of the security interest in the first place. This problem could find resolution in shifting the loss in such a case to the debtor-merchant, but in a case where the debtor-merchant is already insolvent, the resolution is one in name only.

¹⁹⁹ U.C.C. § 9-203.

C. *Disabling Other Competing Security Interests*

A third solution that takes a passive approach to consumer fairness would be to disable other security interests from impairing the consumer's value in the SVP. Article 9 could make security interests void to the extent that they impair a consumer SVP. Such a solution would have the benefit of providing a clear rule for other lenders, who should not extend value on the assumption that the merchant-debtor's payment intangibles would secure its lending.

This type of solution has the benefit of familiarity within Article 9 and consumer law regulation. Article 9 makes certain transactions unattachable when it relates to consumer transactions. For example, after-acquired property clauses are not effective to create security interests in consumer goods unless the debtor acquires the goods within ten days of giving value.²⁰⁰ Similarly, the UCC provides that the normal rule for continuation of security interests after disposition is disabled in favor of consumers in two circumstances: where the buyer purchases the goods in the ordinary course of the merchant's business; and where the buyer purchases a good which was subject to an automatic PMSI before the filing of a financing statement and where the goods were purchased for buyer's personal, family, or household purposes.²⁰¹ Article 3 does not allow the holder in due course to avoid personal defenses by consumers where the instrument did not provide direct notice of the potential transferability.²⁰² Each of these instances represents examples of how the UCC and federal consumer law disable other creditor security interests in the furtherance of fairness, amongst other values. Disabling other creditor interests in the SVP, though certainly protecting the consumer's interest against the merchant-debtor's insolvency, does not resolve the problem of the merchant that breaches the terms of the agreement. The benefit of this solution is that it treats all consumers as equal.

²⁰⁰ *Id.* § 9-204(b)(1).

²⁰¹ *Id.* § 9-320.

²⁰² This approach is not an unusual approach to consumer protection. As mentioned in Part II, a holder in due course is subject to personal defenses by a consumer when the instrument does not inform the consumer that it may be transferred to a holder in due course. *See* U.C.C. § 3-305(e); 16 C.F.R. § 433.1 (2014).

CONCLUSION

SVPs present numerous challenges to normal consumer and commercial frameworks. Normal commercial frameworks operate within constructions that treat similarly situated parties in similar ways, with the assumption that parties have similar means for protecting themselves against risk of loss in the transaction. SVPs present the unique challenge of consumption gentrification where our assumptions that like parties are alike does not always hold.

Consumption gentrification as a metaphor for market confusion suggests that disparate economic groups may understand the impacts of their transactions differently. A salient example is how prepaid cards have found popularity amongst differing groups of economic participants—low-income non-banking users and moderate-income individuals. Though equally beneficial, there remains a stark imbalance between the risks the issuer takes on compared to that of the holder. Remedies aside, the low-income user is lured to the merchant's transaction through the prepaid card; acquiring one is just one more point-of-sale encounter, in which the merchant is already intimately familiar, though unaware of the remedies—or lack thereof—at its disposal.

